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New York (State) Reports. Supreme Court.

REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR,
Counsellor at Law.

VOL. XXIII.

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DURING THE YEAR 1857.

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" 2. JAMES J. ROOSEVELT.
" " HENRY E. DAVIES.
" 3. THOMAS W. CLERKE.
" 4. CHARLES A. PEABODY.

SECOND JUDICIAL DISTRICT.

" 1 JOHN W. BROWN.†
" 2 SELAH B. STRONG.*
" 3 LUCIEN BIRDSEYE.
" 4. JAMES EMOTT.

THIRD JUDICIAL DISTRICT.

" 1. MALBONE WATSON.‡
" " DEODATUS WRIGHT.§
" 2. WILLIAM B. WRIGHT.*
" 3. IRA HARRIS.
" 4. GEORGE GOULD.

FOURTH JUDICIAL DISTRICT.

" 1. CORNELIUS L. ALLEN.*
" 4. AMAZIAH B. JAMES.
" 3. ENOCH H. ROSEKRANS.
" 4. ALONZO C. PAIGE.†

FIFTH JUDICIAL DISTRICT.

CLASS 1. FREDERICK W. HUBBARD.*
" 2. DANIEL PRATT.
" 3. WILLIAM J. BACON.
" 4. WILLIAM F. ALLEN.

SIXTH JUDICIAL DISTRICT.

" 1. WILLIAM H. SHANKLAND.†
" 2. HIRAM GRAY.*
" 3. CHARLES MASON.
" 4. RANSOM BALCOM.

SEVENTH JUDICIAL DISTRICT.

" 1. THOMAS A. JOHNSON.*
" 2. THERON R. STRONG.
" 3. HENRY WELLES.
" 4. ERASMUS DARWIN SMITH.

EIGHTH JUDICIAL DISTRICT.

" 1. LEVI F. BOWEN.†
" 2. JAMES MULLETT.*
" 3. BENJAMIN F. GREENE.
" 4. RICHARD P. MARVIN.

* Presiding Justice.

† Sitting in the Court of Appeals.

‡ Died April, 1857.

§ Appointed by the Governor, to fill the vacancy caused by the death of Judge WATSON.

ERRATA—VOL. 22.

Page 195, line 16, before the word "*Held*," add—; but if she should die, either before or after the testator's decease, leaving lawful issue, then her share in said estate to go to such child or children, their heirs and assigns forever.

" 277, " 7, from bottom, strike out *an* and insert *to;* for *original* read *originate.*

" 307, " 7, from bottom, for *beneficial* read *beneficent.*

" 312, " 23, for *uncorruptible* read *uncorrupted.*

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CASES

IN

Law and Equity

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

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WESTFALL *vs.* JONES and others.

The law will never lend its aid to either of the parties to a fraud, to enforce an executory contract, nor to rescind or disturb one which has been executed, if founded in immorality or upon transactions forbidden by law.

The maxim in such cases is, *in pari delicto potior est conditio defendantis.*

Accordingly, where a suit was pending against J. and others, and J , with the view and for the purpose of creating a lien upon his real estate, prior to any which should be created thereon by virtue of the judgment to be recovered against him in that action, if any, executed a mortgage upon his land to P., with the understanding that the same should be under the control of J., to be assigned and foreclosed if he should so direct, or to be delivered up and canceled if J. should succeed in his defense to the suit; and there was no other inducement or consideration for giving such mortgage; *it was held* that the mortgage was absolutely void, whether in the hands of the mortgagee, or of an assignee deriving title through him.

Held, also, that the assignee of such mortgage, although he took the assignment thereof in good faith, and without notice or knowledge of the facts, had no other or greater rights in respect to the mortgage, and stood in no better condition to enforce it, than the mortgagee.

Westfall *v.* Jones.

Persons purchasing mortgages can always protect themselves by inquiring of the mortgagors whether the securities are valid; and if they purchase upon the faith of the mortgagors' representations that the same are valid, the mortgagors will be estopped from setting up the contrary.

Where a purchaser neglects this precaution, he will be considered as taking the securities upon the credit of the assignor, as to their legal validity.

THIS action was brought to foreclose a mortgage, and was heard upon pleadings and proofs.

A. Worden, for the plaintiff.

S. V. R. Mallory, for the defendant Jones.

WELLES, J. This action was commenced to foreclose a mortgage given by the defendant Jones to Jabez Parsons, dated July 1, 1846, to secure the payment, to said Parsons, of the sum of $1078.81, with interest thereon, on the first day of January next after the date thereof, according to the condition of a bond of the defendant to said Parsons, of the same date. The bond and mortgage were assigned by Parsons to Joel Westfall, on the 6th day of March, 1848, and subsequently by Joel Westfall to the plaintiff. The only defendant who appeared was Jones; the other defendants being made parties as junior incumbrancers. The defense set up by the defendant Jones is, that at the time of the execution of the bond and mortgage in question, a suit was pending against him, together with Spencer Hildreth and William Hildreth, who were then insolvent, in favor of George La Fever, upon a note executed by the Hildreths to La Fever, and which Jones had signed as their surety, for about $2000. That Jones was not indebted to Parsons in any amount whatever, at the time the bond and mortgage were executed, and that the same were made and delivered to Parsons with the view and express understanding to create a lien upon the mortgaged premises, prior to that which should be created by any judgment which might be recovered in the action then pending in favor of La Fever against the Hildreths and Jones. That the bond and mortgage

were to be under the control of Jones, to be assigned and foreclosed if he should so direct, or to be delivered up and canceled if Jones should succeed in his defense to the suit brought by La Fever, on the note; and that there was no other inducement or consideration whatever, for giving the bond and mortgage. These facts are, in my judgment, fully established by the evidence. It is also fully proved that the assignments by Parsons to Joel Westfall, and by the latter to the plaintiff, were for a full consideration paid at the times of such assignments, and that the Westfalls received the said assignments in good faith, without notice or knowledge of the facts above stated, connected with the execution of the bond and mortgage, and believing them to be good and valid securities, and given by the defendant to secure a *bona fide* indebtedness, according to their apparent tenor and effect. It does not appear that the defendant ever consented to either of the assignments, or that he knew of them until after they were made; or that he has ever done any act, except giving the bond and mortgage, by which such consent or knowledge can be intended or inferred. It is also shown that the suit in favor of La Fever against the Hildreths and Jones was tried at the Ontario circuit in May, 1847, and a verdict and judgment rendered in favor of Jones.

Upon the foregoing facts the question arises, whether the plaintiff in this action is entitled to any relief; in other words, whether he should have judgment of foreclosure in the action, according to the prayer of his complaint.

If the bond and mortgage had not been assigned by Parsons, and this action had been brought by him, no doubt could be entertained. The transaction between him and the defendant Jones is steeped in immorality and fraud, on both sides, without one single redeeming consideration; and the law will never lend its aid to either of the parties to the fraud, to enforce an executory contract, nor to rescind or disturb one which has been executed, founded in immorality, or upon transactions forbidden by law. (*Nellis* v. *Clark*, 20 *Wend.* 24. *S. C.* 4 *Hill*, 424. *Holman* v. *Johnson*, *Doug.* 341–3.) Indeed the books

are full, to the same effect. The maxim in such cases is *in pari delicto potior est conditio defendentis.*

Does the plaintiff, being a *bona fide* purchaser, and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title? It is a well settled principle, that the assignee of a chose in action takes it subject to all equities which existed against it in the hands of the assignor. It is contended, however, on the part of the plaintiff, that here are no equities between the original parties; and that the principle just stated does not contemplate a case of this description, but applies only to cases of legal transactions, where one of the parties is under some obligation to pay or perform, but which is connected with some condition, which may defeat or modify the obligation, or where something has been done or has happened subsequently, and before the assignment, which would have the same effect. It is also argued, that the defendant having made and delivered to Parsons these fraudulent securities, and thus placed it in the power of the latter to put them in circulation, and impose upon innocent persons, is estopped from setting up this defense, as against the plaintiff.

But I am prepared to hold that the plaintiff has no other or greater rights in relation to this bond and mortgage, and stands in no better condition, than Parsons, the mortgagee. Clearly, the latter could assign to the former no other rights than he possessed himself. He had no right of action upon the securities, and could, of course, transfer none. The plaintiff has no rights except as derived from Parsons, through the assignment. It is immaterial on what ground the law would refuse its aid to Parsons. If he had no right to recover before the assignment, it seems perfectly clear to me he could confer none upon another. Persons purchasing this class of securities can always protect themselves by inquiring of the obligors whether they are valid; and if they purchase upon the faith of the obligors' representations, that the securities are valid, the latter would clearly be estopped from setting up the contrary. In *Murray* v. *Lylburn*, (2 *John. Ch. R.* 441,) Chan-

cellor Kent says, on page 443, "The assignee can always go to the debtor and ascertain what claims he may have against the bond or other *chose in action* which he is about purchasing from the obligee." Where the purchaser neglects this precaution, he must be deemed as taking the securities upon the credit of the assignor as to their legal validity. (*Willis* v. *Twambly*, 15 *Mass. R.* 204.) In this case the plaintiff comes into court and asks for the enforcement of a contract conceived and executed in iniquity by both the parties to it. True, *he* was not a party to the fraud, but he must necessarily subrogate himself to the place of one of the guilty parties, and standing in the place of the latter, ask the court to lend him assistance to obtain what they would refuse to the party with whom he stands in immediate privity. This, I think, he has no right to do.

There must be judgment for the defendant, with costs.

[YATES SPECIAL TERM, November 28, 1853. *Welles*, Justice.]

JEWETT *vs.* BANNING.

In an action for an assault and battery it appeared on the trial that in May, 1852, the plaintiff's arm was considerably injured, and she claimed that the injury was caused by the defendant violently seizing her arm and wrenching it. There was no direct and positive evidence that the injury was occasioned by the defendant. Two witnesses, T. and J., testified that shortly after the plaintiff's arm was injured they heard her charge the defendant with having injured it, and that they did not hear the defendant deny the charge. W. and S. gave evidence tending to show that about an hour before this the plaintiff made substantially the same charge, which the defendant denied. The evidence was such that the jury would have been justified in finding that there was an interval of an hour between the two conversations, and that they took place on different occasions. The judge instructed the jury that if the plaintiff charged the defendant with having committed the assault, and the latter at the same time denied it, then it furnished no evidence against him; but if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they might think it entitled to. That they would not, probably

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conclude that the defendant, after he had once emphatically denied the accusation, on that occasion, was called upon to deny it again if the accusation was repeated. He however left it to the jury to give such weight to the defendant's silence, when the charge was repeated, as they thought it entitled to, under the rules which had been stated by him, as to the effect of remaining silent. *Held*, that the charge was not erroneous; and a verdict in favor of the plaintiff was sustained.

Held, *also*, that although the charge made by the plaintiff against the defendant furnished no evidence of the guilt of the latter, provided it was promptly denied at the time, such denial was not an absolute shield to the defendant for all subsequent occasions when the charge should be repeated.

In such a case the effect of the defendant's conduct, when the charge is repeated, is a proper subject for the consideration of the jury, as a circumstance of more or less weight, depending among other things, upon the length of the interval between the denial of the charge and a subsequent time when the defendant remained silent under the charge.

APPEAL from an order made at a special term, granting a new trial. The action was for an assault and battery alleged to have been committed by the defendant upon the plaintiff. The plaintiff recovered a verdict, at the Monroe circuit, which was set aside at a special term held in the county of Yates in November, 1855.

E. A. Hopkins, for the appellant.

H. R. Selden, for the respondent.

By the Court, WELLES, J. As we are satisfied with the views of the learned justice who held the special term, on all the points excepting the one upon which the new trial was granted, it will be unnecessary to consider any except the latter.

Upon the trial it appeared that in November, 1852, the plaintiff's arm was considerably injured, which she claimed was done by the defendant violently seizing and wrenching it. There was no direct and positive evidence that the injury was occasioned by the defendant. Josiah Trip, a witness for the plaintiff, testified, among other things, that shortly after the plaintiff's arm was injured he heard her charge the defendant with having injured her arm. This charge was in the pres-

ence of the defendant and several other persons The witness stated that he did not hear the defendant make any reply to this charge. John Jewett, another witness introduced by the plaintiff, was present on the occasion testified to by Trip, and did not hear the defendant deny the charge. There was evidence, by the defendant's witnesses Warner and Spencer, tending to show that about an hour before this, on the same day, and when the witnesses Trip and Jewett were not present, the plaintiff made substantially the same charge, which the defendant denied. There was a good deal of evidence given on both sides, but this is sufficient to enable us to appreciate the charge of the judge upon the question under consideration.

The judge, among other things, instructed the jury that if the plaintiff charged the defendant with committing the assault, and he at the same time denied it, then it furnished no evidence against him; but if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they might think it entitled to. That the jury were to determine. That there was some doubt from the evidence, perhaps, whether the charge, after it had been once made and denied, was repeated on the occasion, and if it was repeated, whether the defendant then remained silent. The judge here explained the nature and principles of such evidence. He stated to the jury, on this part of the case, that they would not probably conclude that the defendant, after he had once emphatically denied the accusation on that occasion, was called upon to deny it again, if the accusation was repeated; but would leave it to the jury to give such weight to his silence when the charge was repeated, if it was repeated, as they thought it entitled to, under the rules which had been stated, as to the effect of remaining silent. It was upon an exception to this part of the charge that the new trial was granted. Upon a fair view of the charge in this respect, we are unable to perceive that any rule of law has been violated. The evidence was all confessedly admissible; first, by the witnesses Trip and Jewett, that the defendant, when charged with having committed the assault, remained silent; and then, by the wit-

nesses Warner and Spencer, that when they heard the charge made, it was denied by the defendant. The only question is upon the way it was submitted to the jury by the justice. They were told by him that if the plaintiff charged the defendant with having committed the assault, and he at the same time denied it, then it furnished no evidence against him; but if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they might think it entitled to. So far, the defendant has no reason to complain. It was the ordinary application of the maxim, *qui tacet consentire videtur.* The complaint which the defendant makes of the judge's charge in this connection is, that, as his counsel claims, the jury were instructed that although they should believe, from the evidence, that when the plaintiff first charged the defendant with committing the assault upon her he denied it, yet if they also believed that immediately afterwards, and on the same occasion, the charge was repeated and the defendant remained silent, they were at liberty to interpret such silence as evidence of his guilt. The judge did not say this, nor do I think that what he did say can be thus construed. On the contrary, he told the jury that they would not probably conclude that the defendant, after he had once emphatically denied the accusation, on that occasion, was called upon to deny it again if the accusation was repeated. The judge, however, left it to the jury to give such weight to the defendant's silence, when the charge was repeated, if it was repeated, as they thought it entitled to, under the rules which had been stated as to the effect of remaining silent. The case does not profess to give the whole of the judge's charge, nor was any request made that he should present any other or further view of the case. When, as the case states, he explained the nature and principles of such evidence, it is to be intended that such explanation was correct and in accordance with the law; and it is with reference to such explanation, together with what immediately followed, that the concluding sentence of the charge is to be understood

The jury would have been justified by the evidence in finding that there was an interval of an hour between the conversation

testified to by the witnesses Trip and Jewett, and the one to which Warner and Spencer refer, and that they were at different interviews and on different occasions. If the jury might have so found, the defendant has no ground to complain of the charge. If he thought the judge had not been sufficiently explicit in his instructions, on the supposition that the evidence of the witnesses for the defendant, and of those for the plaintiff, referred to the same conversation, he should have directed the judge's attention to the subject, and requested him to instruct the jury as to the effect of the denial of the charge upon such supposition. This, however, could hardly have been necessary, as the judge had been as explicit in that respect as the defendant could have desired.

While it is undoubtedly true, as the jury in this case were instructed, that the charge made by the plaintiff against the defendant furnished no evidence of the guilt of the latter, provided it was promptly denied at the time, it does not follow, nor, as I think, can it be maintained, that such denial is an absolute shield to the defendant for all subsequent occasions when the charge should be repeated. In such case, the effect of the defendant's conduct when the charge is repeated, is a proper subject for the consideration of the jury, as a circumstance of more or less weight, depending, among other things, upon the length of the interval between the accusation when he denied the charge, and a subsequent one, when he remained silent under it.

Upon the whole, we think the order of the special term granting a new trial should be reversed, and that the plaintiff should have judgment upon the verdict.

Ordered accordingly.

[Cayuga General Term, June 2, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

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ROCHESTER *vs.* TAYLOR and DAVIS.

Where, in an action upon a promissory note, against the maker and indorser, the indorser sets up the defense that the note was indorsed by him for a particular purpose, and no other, for the accommodation of the maker, and that there has been a diversion of the note to a different purpose; and the answer alleges that when the plaintiff received the note he had notice of the object and purpose of the indorsement, this constitutes *prima facie* a good defense to the indorser; and it is not necessary for him to allege, in his answer, that he has been *injured* by the diversion.

It is incumbent upon the plaintiff to show that the indorser has *not* been injured.

DEMURRER to the answer of the defendant Davis. The complaint was on a promissory note, dated October 23, 1855, made by the defendant Taylor, payable to the order of the defendant Davis, for $250 at sixty-three days, payable at the Rochester City Bank. After setting forth the note, the complaint stated: "And that thereupon the defendant, Zimri L. Davis, at the request of said Taylor, and for his, said Taylor's accommodation, indorsed in blank the said note. And the plaintiff further states that afterwards, and before the maturity of said note, to wit, on the 24th day of October, 1855, the plaintiff, at the request of said Taylor, lent and advanced to him, said Taylor, two hundred and fifty dollars, and that said Taylor then and there at the same time, for the purpose of securing to the said plaintiff the payment of said sum so lent and advanced and in consideration thereof, transferred and delivered said note so indorsed as aforesaid, to the plaintiff, and that the plaintiff is now the holder and owner thereof." The complaint then alleged the due demand and non-payment of the note, and notice thereof to the defendant Davis; and that the note and the sum so lent and advanced, remained wholly due and unpaid, and demanded judgment for the amount of the note and interest.

The defendant Davis put in a separate answer which stated "that on or about the 23d day of October, 1855, the defendant Ezra Taylor applied to this defendant for his indorsement upon the note upon which this action is founded, for the purpose of renewing a certain promissory note which had been before that time made by said Taylor and by him procured to be dis

counted, and upon which the said Davis was security, as indorser, for the sum of two hundred and fifty dollars, then due or nearly due, and payable at the Rochester City Bank. That this defendant then, upon the said Taylor's so agreeing to use and apply said note, indorsed the same for that purpose and not otherwise, of all which the plaintiff then had due notice. That said Taylor thereafter, as this defendant is informed and believes, delivered the said note to the plaintiff as collateral security for the payment of a check drawn by said Taylor upon some bank or banking house, for the sum of two hundred and fifty dollars, then held by the plaintiff, and before that time delivered to the plaintiff by said Taylor, and then and now held by said plaintiff; which is the only transfer then or ever made of said note to the plaintiff. The plaintiff demurred to this answer for insufficiency, and specified the following grounds of demurrer: "1. The said answer does not contain facts sufficient to constitute either a defense, counter-claim or set-off. 2. It does not allege or show that the defendant Davis has ever sustained any damage, injury or disadvantage, by reason of the matters therein stated, or any of them. 3. It does not show or allege that he has ever been charged as indorser on the note mentioned in his answer as due or nearly due at the time he indorsed the note mentioned in the complaint; nor that he has ever been compelled to pay such other note. 4. It does not allege or show that said note, other than that mentioned in the complaint, has not been paid by said Taylor; nor that it has not been surrendered to said Davis or paid or canceled by said Taylor; nor that it has not been so surrendered, paid or canceled by said Taylor before the commencement of this action."

T. C. Montgomery, for the plaintiff.

T. Mathews, for the defendant Davis.

WELLES, J. The answer shows that the note on which the action is brought was indorsed for the purpose of renewing a previous one of the same amount, made by the defendant Taylor,

then due or nearly due, on which the defendant Davis was security as indorser, and that this was done by the defendant Davis at the request and for the accommodation of the defendant Taylor, and under an agreement by the latter to use and apply it for that purpose and no other. The answer also shows a diversion of the note to another and totally different purpose; and that when the plaintiff received it he had notice of the object and purpose of the indorsement.

The plaintiff, however, insists that the answer fails to show that the defendant has been injured by the diversion. This was not necessary to be stated in the answer. If the note has accomplished, substantially, the purpose for which the defendant indorsed it, that would be a good answer to the alleged diversion. Here, as the pleadings show, was a clear diversion, which was *prima facie* a defense to the indorser. The defendant Davis did not, by indorsing the note, intend to increase his liability. If, instead of renewing the old note, as was contemplated, Taylor procured the one in question to be discounted, and applied the procceds to the payment of the old one, that would have been a substantial compliance with the agreement, and not a diversion. But it was incumbent upon the plaintiff to show it, or set up some facts, either in a reply or at the trial, which would relieve the case of the objection that there had been a diversion. *Non constat* that the first note is not still in existence, and the defendant liable upon it. The diversion is clearly shown; and the answer to it, namely, that the indorser has not been prejudiced by it, should be as clearly shown.

There must be judgment for the defendant Davis, on the demurrer, with leave to the plaintiff to reply or go to trial upon the complaint and answer, upon payment of costs of the demurrer.

[Monroe adjourned Special Term, June 10, 1856. *Welles*, Justice.]

The Buffalo, Corning and New York Rail Road Company *vs.* Pottle.

The articles of association of a rail road company provided that the road should extend from Buffalo to connect with the N. Y. and Erie Rail Road at P. P. in the county of Steuben, and that it should pass through portions of the counties of Monroe and Ontario. The defendant subscribed these articles, for stock to the amount of $1000. After he had subscribed the articles, the road was located and constructed from Steuben county to Batavia, without passing through, or touching, either of the counties of Monroe and Ontario. *Held* that this was a substantial departure from the contract, and one which released the defendant from his obligation to pay his subscription.

Where the act of incorporation, or articles of association, prescribe the limits within which a rail road company shall construct its road, it cannot, even under the 23d section of the general rail road act, alter or change the route, after it has been located, so as to transcend those limits; at least not without releasing previous subscribers for stock who have not consented to such change.

MOTION by the plaintiffs for judgment on a verdict taken at the circuit in Yates county, in April, 1855, subject to the opinion of the supreme court on a case. The action was brought to recover the amount of the defendant's subscription to the plaintiffs' articles of association, for $1000 stock in their company. The plaintiffs were incorporated under the general rail road act of 1850. At the trial, various questions arose and decisions were made, to which exceptions were taken; but, as the case is now decided on one point only, the facts in relation to which are sufficiently stated in the following opinion, it is unnecessary to state the other questions, or the evidence in relation to them. The verdict was in favor of the plaintiffs for the amount of the defendant's subscription, and interest.

W. Barnes, for the plaintiffs.

E. G. Lapham, for the defendant.

By the Court, Welles, J. By the third article of the plaintiffs' association, their road was to extend from the city of Buffalo to connect with the New York and Erie Rail Road at or near the village of Painted Post in the county of Steuben

The fifth article is in the following words, viz: "The said rail road is intended to be made from the city of Buffalo to the east line of the county of Erie; thence, through the county of Genesee in an easterly direction; thence, into and through a part of the county of Livingston; thence, into and through a part of the county of Monroe; thence, into and through a part of the county of Livingston; thence, into and through a part of the county of Ontario; thence, into the county of Steuben." It was a part of the plaintiffs' contract with the defendant, that the road should pass through portions of the counties of Monroe and Ontario. After the defendant made his subscription to the articles of association for the stock, the road was located and constructed from Corning to Batavia, without passing through or touching any part of either of those counties. This was, as I think, a substantial departure from the contract, and one which released the defendant from his obligation to pay his subscription. It is suggested by the plaintiffs' counsel that the defendant might have been made liable for the whole of his subscription before the particular route of the road was located. Admitting that to be so, it furnishes no answer to this objection to the plaintiffs' right to recover, any more than it would in the case of a plank road, where the company had extended the road and increased the capital stock without observing the directions of the statute on that subject. In such a case it has been decided that previous subscribers would be released. (*The Macedon and Bristol Plank Road Co.* v. *Lapham*, 18 *Barb.* 312.) What would be the remedy of the defendant in case he had paid his subscription before the track of the road had been located, it is not necessary to consider. It is also contended by the plaintiffs' counsel that the 23d section of the rail road act authorizes the company to alter or change the route of the road at any time. (*Sess. L. of* 1850, *p.* 222, *ch.* 140.) But in this case the route was neither altered nor changed. The section of the act referred to, clearly does not contemplate such alteration or change until the route has been once established, and not then, except by a vote of two-thirds of all the directors, when they are to make and file in the clerk's office of the proper county, a survey,

map and certificate of such alteration or change, after which they have the same right and power to acquire title to lands in such altered or changed route as if the road had been there located in the first instance; and the section concludes with these significant words: "All the provisions of this act relative to the first location and to acquiring title to land, shall apply to such new or altered portion of the route." I am prepared to go further, and to hold that, where the act of incorporation or articles of association prescribe the limits within which a rail road company shall construct its road, it cannot, even under the above 23d section, alter or change the route, after it has been located, so as to transcend those limits, at least without releasing previous subscribers for stock who have not consented to such change. If this is not so, a company who have obtained such stock subscriptions, under a charter or articles of association, to build a road from Albany to Buffalo through certain specified intervening counties and villages, and have located the road accordingly, may afterwards change the route so as to avoid the specified counties and villages, or may diverge at any place they choose and pass through an entirely different portion of the state; and then call on the subscribers to pay. I cannot believe the directors of a rail road company are invested with any such power. It is not a case, in my judgment, where the court are at liberty to measure the advantages or disadvantages to the company or its stockholders, or the convenience of the public, as in the case of combining other objects of business with the running of the road, as was the case in *The Hartford and New Haven Rail Road Co.* v. *Croswell*, (5 *Hill*, 383,) but a limitation of the franchise; a boundary to the discretion of the directors which cannot be exceeded without forfeiting the claims of the corporation under contracts previously entered into, based in part at least upon such circumscribed power.

The defendant is entitled to judgment on the case.

Ordered accordingly.

[Monroe General Term, September 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

PETERS *vs.* WHITNEY.

Where a party agrees to work for another for a month, and, if the parties are suited with each other, that he will work during the season, or six or seven months, he is bound to determine, and make his election, at the end of the month, whether to quit, or stay during the season.

If he continues to work after the expiration of the month, this is presumptive evidence that he has determined to stay through the season; and he cannot afterwards leave the employer's service before the end of the season, except for a cause that would be a justification for abandoning or rescinding the contract.

In an action for the breach of a contract for work and labor to be done upon a farm, evidence of damage occurring to the plaintiff's crops in consequence of the defendant's leaving his service is inadmissible.

The legal measure of damages, in such cases, is the difference between the wages agreed to be paid to the defendant, and the price the plaintiff was obliged to pay for labor to supply his place.

APPEAL from a judgment of the Cayuga county court affirming a judgment of a justice of the peace.

S. Giles, for the appellant.

S. V. R. Cooper, for the respondent.

By the Court, WELLES, J. No sufficient cause appears to justify the defendant in leaving the service of the plaintiff. In April, 1853, he commenced working for the plaintiff, under a contract to work one month, and if the parties liked each other he was to work for the season, or six or seven months. He commenced work in April and worked until August, when he left the plaintiff's service without cause. At the end of the first month was the time for him to have decided whether he liked the plaintiff, and to determine his election whether to quit or to have it a contract for the season. The fact that he continued to work until in August, is presumptive evidence that at the end of the first month the parties were suited with each other. It is preposterous to say that the defendant was at liberty, at any time, to leave the plaintiff's service without cause and on his mere fancy. That right he had at the end of the first

month; but having determined to remain in the plaintiff's service, after that, he could not leave him before the season had expired, without violating his contract; unless for a cause that would be a justification for abandoning or rescinding the contract. The justice, however, committed an error in admitting evidence of the damage to the plaintiff's crops, in consequence of the defendant leaving his service. The legal measure of damages in such cases is the difference between the contract price with the defendant and the price the plaintiff was obliged to pay for labor to supply his place.

The justice rendered judgment in the plaintiff's favor for five dollars damages. It does not appear, and we cannot see, on what account these damages were adjudged; whether for the injury to the crops, or excess paid for other labor, or both. If any part of it was for the former, it was error. The evidence was objected to and erroneously admitted. For this reason the judgment of the county court and that of the justice should be reversed.

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

Ferdinand St. John *vs.* James Northrup.

Upon the trial of an action of ejectment, brought in the names of several plaintiffs, the defendant's counsel, upon the opening of the case, moved for judgment on the ground that the complaint did not state facts sufficient to constitute a cause of action in favor of either of the plaintiffs separately, or in favor of all of them, jointly, whereupon the plaintiff's counsel offered to rely upon the title of F. S., one of the plaintiffs, and moved for leave to amend the complaint so as to set up title in him alone. The judge permitted the trial to proceed upon the offer of the plaintiff's counsel to rely exclusively upon the title of F. S.; leaving the plaintiffs to apply for leave to amend. The court, at special term, subsequently made an order giving leave to the plaintiffs to amend the complaint, so as to charge that the title was in F. S. alone. *Held*, that the rulings at the circuit were upon questions of practice, not affecting

the merits of the controversy; and that they were within the discretion of the court, and did not form sufficient grounds for granting a new trial, or for refusing judgment for the plaintiff upon a case.

Where a complaint alleged that W. J. S. died seised of real estate, leaving no child capable of inheriting, and that the land thereupon descended to F. S. *as sole heir at law*, &c.; *Held*, that this must be regarded as equivalent to an allegation that F. S. was W. J. S.'s heir and only heir at law.

Less strictness should be observed in considering objections to a complaint, after the defendant has answered upon the merits, and waits until the trial to raise them, than if the questions were presented by demurrer to the complaint.

It is only such defects in the complaint as are incurable, that a defendant can take advantage of on the trial.

Where a complaint, in ejectment, described the premises as *about* fifty acres in the southern part of a lot, which was fully and perfectly described; *Held* that this was a sufficient description; but that if necessary the complaint could be amended, by striking out the word "about."

By the 14th section of the title of the revised statutes relative to the descent of real property, in case of the death without descendants, of an intestate who is illegitimate, the inheritance is to go to the relatives of the intestate on the part of his mother, only in case she be dead, which means, if she be dead at the time of the death of the intestate.

Where the mother is living, at the time of the death of an illegitimate intestate, the case provided for in the statute, in which the relatives of the intestate on the part of the mother shall inherit, does not arise, and the common law rule must govern.

And if the mother of the intestate is an alien, so that she cannot inherit the lands, the brother of the intestate cannot receive the inheritance through her.

By the common law, a person of illegitimate birth, not having inheritable blood, can neither inherit lands himself, nor transmit them by descent to any other person, excepting his own legitimate offspring, or persons otherwise capable of inheriting, claiming by inheritance from or through them.

MOTION by the plaintiff, Ferdinand St. John, for judgment on a verdict in his favor, taken at the circuit held in Ontario county in February, 1855, subject to the opinion of the supreme court upon a case. The facts stated in the opinion of the court are sufficient for the understanding of the questions decided. The action was to recover the possession of real estate.

A. H. Dana and *H. R. Selden*, for the plaintiff.

E G Lapham and *B. F. Cooper*, for the defendant.

By the Court, WELLES, J. The issue originally made by the pleadings was between John Henry Herbert St. John, an infant, by his guardian Henry Joseph St. John, and Ferdinand St. John, as plaintiffs, and the defendant. The complaint stated, in substance, that William James St. John, deceased, the father of the plaintiff, John Henry Herbert St. John, was seised in fee of the premises in question. That in the year 1845, the said William James died, leaving a will, whereby a power in trust was granted to the executors therein named, to sell all his estate, real and personal, in the state of New York, and after satisfying the charges and incumbrances thereon, to divide the proceeds equally between the wife and children of the said William James. That he left him surviving a wife and one child, viz. the plaintiff, John Henry Herbert St. John, who was born abroad, viz. in France, and is now an infant, &c. That the wife has since died, leaving no other children than the said John Henry Herbert, and that she was an alien. That the said John Henry Herbert is sole heir of whatever estate was left by the said William James St. John, and also of the deceased wife, and that, subject to the execution of the power contained in the said will, the title to the lands in question descended to the said John Henry Herbert, unless he is precluded from inheriting by reason of having been born out of the United States; and that in case he is thereby disabled, then that the said Henry Joseph and Ferdinand, as brothers of the deceased William James St. John, took by descent the title to the lands, subject in like manner to the execution of the said power, unless the said Henry Joseph is precluded by reason of having been born out of lawful wedlock, and if disabled thereby to inherit, then the title to the said lands descended to the said Ferdinand alone, subject to the execution of said power.

The foregoing contains a statement of the title of the plaintiffs. The complaint then alleges the wrongful entry by the defendant, in the lifetime of the said William James, with subsequent and continued refusal to deliver up the same. The description of the premises claimed is in the following words: "About fifty acres of land in the southern part of lot number

eight in the fifteenth range of lots, in township number seven in the fourth range of townships, in Phelps and Gorham's purchase; all which property is situated in the town of Naples, in the county of Ontario and state of New York."

The complaint concludes with a demand of judgment for the possession, &c. and $1000 damages, &c. The defendant's answer was a denial of each and every allegation contained in the complaint. At the trial, the plaintiffs' counsel being about to proceed with the evidence on their part, the defendant's counsel objected, and moved for judgment in favor of the defendant, on the ground that the complaint did not state facts sufficient to constitute a cause of action in favor of either of the plaintiffs separately, or in favor of all of them jointly. The plaintiffs' counsel then offered to rely upon the title of the plaintiff Ferdinand St. John, and moved for leave to amend the complaint so as to set up title in him alone. The defendant's counsel objected to such amendment being made. The judge permitted the trial to proceed upon the offer of plaintiffs' counsel to rely exclusively upon the title of Ferdinand St. John, leaving the plaintiffs to apply thereafter for leave to make the necessary formal amendments. To this the defendant's counsel excepted. The proposed amended complaint is similar to the original one, excepting that it is entitled in the name of Ferdinand St. John as sole plaintiff, and excepting also in the statement of the plaintiff's title to the premises in question. It states the seisin of William James St. John, his will and death, leaving a child born in France, the subsequent death of his wife, leaving no other children than said John Henry Herbert St. John, and that she was an alien, in like manner as stated in the original complaint. It then states "that the title to the said lands descended, on the death of the said William James, to him the said Ferdinand, as sole heir at law, subject to the execution of the power contained in the said will." In pursuance of the leave granted, &c. a motion was made at a special term, held in the county of Wayne, in October, 1855, for leave to amend the complaint conformably to the foregoing proposed amended complaint, which was annexed to the case, and a copy thereof served, with the

copy of the case as proposed by the plaintiff, upon the defendant's attorney; upon which motion—which was opposed—an order was made that the plaintiff should have leave to amend the complaint so as to conform the same to the copy so served, and that the complaint as amended, be included in the case, upon certain conditions mentioned in the order, which have been complied with by the plaintiffs.

The defendant's counsel now contends that it was an error at the circuit to allow the plaintiff to proceed in the name and upon the title of one of the original plaintiffs alone, and that the special term had no authority to make the order for the amendment of the complaint. The rulings at the circuit on this subject were upon questions of practice, not affecting the merits of the controversy between the parties. They were not calculated to produce any surprise of which the defendant has a right to complain, nor to obstruct, but rather to advance, the ends of justice, and were clearly within the discretion of the court. We think they do not form sufficient grounds for granting a new trial, or of refusing judgment for the plaintiff on the case. (*Code*, § 173.)

The issue must now be regarded, for the purposes of all the questions arising upon the present case, as having been formed upon the amended complaint, and the answer of a general denial of all its allegations as put in to the original complaint, and the objection made at the trial, to the sufficiency of the complaint, must be regarded as made to the amended complaint. That objection, as so applied, was that the amended complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff Ferdinand St. John. It was reduced upon the argument to the following specifications: 1st. That whether the will of William James St. John vested a fee or a mere power in trust in the executors is a question for the court, upon an examination of the will, which is not shown or its whole contents stated, and not a question for the jury. This specification is not warranted by the complaint. The whole statement of the pleading in relation to William James St. John having left a will must be taken together, as well the statement of the contents of the will as the fact of his having left a will. When

this is done, it is obvious that the title or fee of the land did not pass by the will, which contained a power in trust to the executors to sell all his estate, real and personal, in the state of New York. There is no propriety in, or authority for saying, in the absence of any statement or allegation in the complaint to that effect, that the will made a disposition of the fee during the interval between the death of the testator and the execution of the power in trust to sell. If it did not, then the fee descended to the lawful heirs of the testator, if he had any, who would hold until the power was executed. 2d. Another specification is, that the complaint states no fact showing that Ferdinand was the heir at law of William James St. John. It is sufficient to say, in reference to this objection, that the complaint alleges that upon the death of William James, the title of the premises in question descended to Ferdinand, *as sole heir at law*, subject, &c. The fact that Ferdinand is the sole heir at law of William James is here substantially alleged. No one can fail to see that such was the intention of the pleader. Less strictness should be required in considering this question, after the defendant has answered upon the merits and waits until the trial to raise it, than if the question was presented by demurrer to the complaint. It is only such defects in the complaint as are incurable, that the defendant can take advantage of on the trial. (*Burnham* v. *De Bevorse*, 8 *How. Pr. R.* 159.) The case of *Lawrence* v. *Wright*, (2 *Duer*, 673,) referred to by the defendant's counsel, was decided on demurrer to the complaint, and was a clear case of a radical defect in the complaint. In the present case the amended complaint shows that William James St. John died, leaving no child capable of inheriting, and that the land in question thereupon descended to Ferdinand, as sole heir at law, &c. This, I think, in this stage of the case, may be regarded as equivalent to an allegation that Ferdinand was William James's heir and only heir at law. Upon the whole, it will be best, under the circumstances, to overrule this objection in this place, as the case subsequently presents the evidence in support of the claim of Ferdinand to the inheritance, which will be hereafter fully considered. 3d. There is one other

objection taken to the amended complaint, viz. that the premises claimed are not sufficiently described. Whatever might be said if the objection had been taken by demurrer, I think it comes too late. I doubt very much whether it should prevail in any stage of the action. The premises are described as *about* fifty acres in the southern part of a lot, which lot is fully and perfectly described. If the word "about" were expunged, there would be no question. It would then call for fifty acres, bounded on the east, south and west by the east, south and west lines of the lot, and on the north by a line parallel with the south line, far enough north to include fifty acres. The north line, then, could be easily ascertained by measurement. If necessary, the complaint can be further amended, by striking out the word "about," and then all ground of objection in this respect will be removed. Upon the trial, the plaintiff gave evidence tending to show that William James St. John was seised in fee in his lifetime of the premises described in the complaint, or of some part thereof. A stipulation signed by the attornies in this and several other causes was then read in evidence by the plaintiffs' counsel, by which the following facts were admitted, viz: That the late Lord Bolingbroke, of England, the father of two of the plaintiffs, viz. Henry Joseph St. John and Ferdinand St. John, having a wife in England, married, under the feigned name of Bellassis, the Baroness Homspech, a German lady, and brought her to America about the year 1795, and was domiciled in the United States several years, until after the death of his first wife, which occurred in the year 1804. He was then married a second time to the Baroness Homspech, in the city of New York. That the said Lord Bolingbroke had five children by that lady, all born in the United States, viz. William James St. John, Henry Joseph St. John, and two daughters, Isabella and Antoinette, and the said Ferdinand St. John. The first four were born before, and the youngest, Ferdinand, after the second marriage. The daughters died many years ago, before the commencement of these suits, and before the year 1835; that said daughters died under age, intestate and unmarried. That the said five children were born in the city of New York,

and the said William James prior to the year 1802. That about the year 1807, the said Lord Bolingbroke returned to England with his children, where the said William James St. John was married and removed to Boulogne, Sur Mer, in France, where his son, John Henry Herbert St. John, was born in the month of November, 1835, where he and his mother, who was an alien, resided until her death, subsequent to the year 1849. That the said William James St. John died on the 10th of March, 1845, leaving his mother him surviving, who is now dead, but survived her son a number of years.

It is contended on the part of the plaintiff, upon the facts embraced in this admission, that upon the death of William James St. John his lands in this state descended to Ferdinand St. John. It is not claimed, and cannot be, that at the common law such would be the case, because William James St. John was of illegitimate birth, and not having inheritable blood, could neither inherit lands himself, nor transmit them by descent to any other person, excepting his own legitimate offspring or persons otherwise capable of inheriting, claiming by inheritance from or through them. Our statute of descents, however, has introduced a modification of the rule of the common law in this respect. The statute referred to provides that, "In case of the death without descendants, of an intestate, who shall have been an illegitimate, the inheritance shall descend to his mother. If she be dead, it shall descend to the relatives of the intestate on the part of the mother, as if the intestate had been legitimate." (1 *R. S.* 753, § 14.) The mother of William James, Lady Bolingbroke, who survived him, could not under this statute inherit his lands, because she was an alien, and his son, John Henry Herbert, could not inherit, because he was also an alien. His brother, Henry Joseph, was incapable of inheriting, as well because of his own, as of William James's illegitimate birth. The question then is, whether Ferdinand the plaintiff is entitled to the inheritance. He could not receive it through his mother, who was also the mother of William James, because she was an alien, and for that reason incapable of receiving or transmitting the inheritance. We are not able to perceive, therefore, how

the statute can aid the plaintiff in the present case. Ferdinand did not succeed to the inheritance, because, at the death of William James, the latter had a mother who survived him. By the statute, the inheritance is to go to the relatives of the illegitimate intestate, on the part of his mother, only in case she be dead, which means, if she be dead at the time of the death of the illegitimate dying seised. In the present case the mother was living, and therefore the case provided for in the statute, in which the relatives of the intestate on the part of the mother shall inherit, does not arise, and the common law rule must govern. (*The People* v. *Irvin*, 21 *Wend.* 128.)

If this view is correct, it puts an end to the claim of Ferdinand St. John to the premises in question, and supersedes the necessity of considering any of the numerous other questions raised and discussed upon the argument; and it follows that the defendant is entitled to judgment on the case.

Ordered accordingly.

[Monroe General Term, September 1, 1856. *Johnson*, *T. R. Strong* and *Welles*, Justices.]

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23 33
7b 215
36h 564
26a 472
50a 560

Erastus Corning, President of the proprietors of the Albany Pier, *vs.* Thomas L. Greene and others.

The statutes of 1849 and 1851, authorizing joint stock and other companies and associations of seven or more persons to sue or be sued in the name of their president or treasurer, conferred upon those officers no right to sue, except in cases where the shareholders or associates could before have prosecuted.

The intent of those statutes was to obviate the inconvenience of joining all the shareholders or associates as parties; to facilitate an existing right of action, and not to create a new one.

The president of the proprietors of the Albany Pier, by virtue of those statutes can only bring such actions as the pier owners could have maintained before; and prior to the passage of those acts, and under the act of April 5, 1823, the pier owners could not sue the owners of vessels entering the basin, for wharfage.

The corporation of Albany, being by the act of April 5, 1823, authorized and empowered to collect the wharfage on the piers and docks and distribute it among

the pier and dock owners, are the trustees of an express trust, and as such they may maintain an action for wharfage without joining with them the *cestuis que trust*.

The proprietors of the pier, if *as an association* they were really and exclusively interested in a claim for wharfage, might, since the code, also sustain an action for the recovery thereof.

But inasmuch as each pier owner is a distributee of the sums collected by the corporation for wharfage, and receives and holds his share, not in common but separately, and the association is not jointly or in common either entitled to, or interested in, the subject matter, an action will not lie in the name of the president of the pier association, to recover an entire moiety of the wharfage.

It is only in cases where an association, as such, are the owners, or have an interest, joint or in common, in any property, right of action or demand, that a suit may be maintained in the name of the association.

The separate owners of demands, or of separate rights of action, cannot voluntarily associate, and elect a president, and, under the acts of 1849 and 1851, recover in the name of such president, in one suit, the separate demands.

A statute that is not an expression of the legislative will alone, has no binding force as a law. It can only become a law mandatory and obligatory upon those who are the subjects of it, by a declaration of the legislative will. An attempt, therefore, to call in another party to aid in the business, and divide the responsibilities, of legislation, so that the act shall not be the single expression of the legislative will, but the sovereign function is discharged, in part at least, by a party unknown and unrecognized by the fundamental law, would be in contravention of the constitution, and render the act void. But this should be patent and manifest on the act itself.

The legislature may constitutionally pass a law, and provide that it shall take effect at some future period or upon the happening of some future event.

They may also declare that an act passed by them shall cease to exist as a law, unless, within a specified period, an act mentioned in it to be done shall be performed by the person or body to be affected by it.

The cases of *Thorne* v. *Cramer*, (15 *Barb.* 112;) of *Bradley* v. *Baxter*, (*Id.* 122,) and of *Barto* v. *Himrod*, (4 *Seld.* 483,) are not in hostility to this principle.

The provision, in the 12th section of the act of April 5, 1823, authorizing the construction of a basin in the city of Albany, that the corporation of the city should file their consent to the act within sixty days after the passing of the same, otherwise the act should be void, did not render the statute invalid.

By that statute the powers previously possessed by the corporation of the city of Albany were essentially *altered;* and it having received only a majority vote, it was not passed in accordance with the constitution then in force, which required the assent of two-thirds of the members of the legislature to every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, *altering* or renewing any body politic or corporate. The act was therefore inoperative and void.

The act of April 5, 1823, was not a *contract* between the state, the city of Alba

Corning *v.* Greene.

ty, and the proprietors of the pier, even if it had any validity. Therefore the act of April, 1850, granting the right to vessels to enter the basin without the payment of wharfage for so entering, unless they came to, lay at, or made fast to, the pier, which was passed after the basin had become the exclusive property of the state, and the pier owners had released any interest they had therein, did not fall within the provision of the constitution of the United States which forbids a state from passing any law impairing the *obligation of contracts.*

The act of April, 1850, was a valid act. Hence the owners of vessels which do not come to, lie at, or make fast to, the pier on either side, are not liable for wharfage, at the suit of the pier owners.

THIS action was brought in the name of the president of the Albany Pier proprietors, to recover wharfage claimed by the proprietors under the provisions of "An act authorizing the construction of a basin in the city of Albany, at the termination of the Erie and Champlain canals," passed April 5, 1823. The complaint alleged that the pier proprietors were an association or company of more than seven persons, jointly or in common interested in the right of action for which the suit was brought, and that the plaintiff was their president. That the defendants, during the years 1850 and 1851, were the owners of certain vessels navigating the Hudson river, which at various days entered the basin at Albany, and by reason thereof became liable to pay the pier proprietors, for the season, wharfage—for 1850, $623.67, and for the year 1851, $584.91.

The answer of the defendants alleged that prior to the year 1820, the mayor, aldermen and commonalty of the city of Albany, made and delivered divers conveyances for a valuable consideration, whereby they granted and conveyed to Henry J. Bogert and others, all the rights, privilege and franchise of dockage in the harbor of Albany, opposite to and adjoining the docks of the city, known as the middle or inner docks, together with the profits and advantages thereof; and that since such conveyances the franchise of dockage, &c. has continued vested in the grantees of the corporation and those claiming under them; that in the conveyances the corporation of Albany reserved the right of regulating, by by-laws and ordinances, the price of dockage and wharfage on vessels that might lie at said docks, so as that

the same should not be established at a rate less than one-third over and above, nor more than double over and above the rate ascertained and laid by an ordinance of the 26th of November, 1792; that the rate fixed by such ordinance was one shilling per ton for all vessels over the burthen of five tons; that, during the years 1850 and 1851, the vessels mentioned in the complaint entered into the Albany basin and moored at and laid alongside the middle or inner docks aforesaid, for the purpose of discharging and receiving their cargoes. The defendants insisted that the act authorizing the erection of the pier, passed April 5, 1823, was not passed by a two-third vote and was unconstitutional; that after the execution of the conveyances, the corporation of Albany had no right to make ordinances for the payment of wharfage at higher rates than are mentioned in said conveyances; that on the 5th of April, 1850, the legislature passed an act, whereby the pier proprietors were not entitled to charge wharfage for vessels entering the basin unless they should make fast to the pier on the east side of the basin, and that during the years 1850 and 1851, the vessels of the defendants did not make fast to said pier. The cause was tried at the Albany circuit in November, 1852, before Mr. Justice HARRIS.

On the trial, the plaintiff proved that the pier proprietors were more than seven persons in number, and that the plaintiff was their president; that the Albany pier was erected pursuant to the act of April 5, 1823, and that the corporation of Albany, in due form, filed its assent to the said act, and subsequently united with the commissioners, under the act, in the conveyance of pier lots to purchasers; that the conveyances of the pier lots all contained similar provisions, viz: Each deed conveys to the purchaser the lots with the right and franchise of wharfage, dockage, canal tolls, and of other rights created by said act of 1823, and appurtenant to the lot, reserving to the corporation the use of 25 feet from the east end of the lot as a public highway, and jurisdiction over the street, dock and wharves, for public purposes, with no power to change the rates of wharfage provided by the act of 1823. The owners of the pier are to meet annually and elect a president, secretary and su-

perintendent of the pier. The superintendent shall receive all canal tolls payable to the use of the pier owners, and all dockage and wharfage provided by the act; with power to appoint assistants, and out of the funds in his hands to pay them. The first superintendent appointed shall pave the street on the east end of the pier, paying the expenses out of the first moneys received by him for dockage and wharfage. The superintendent, also, with the moneys that may come to his hands for wharfage, dockage and canal tolls, shall make all needful repairs to piers, streets and bridges, so as to keep them at all times in good order, and after paying for such repairs, his own salary and that of his assistants, he is to divide the residue of the funds in his hands annually among the several owners of the pier lots. If at any time the funds for any one year shall be insufficient to pay repairs, &c., the common council of Albany may direct the superintendent to assess the deficiency upon the pier owners, and if the assessment is not paid, the superintendent may sell the lot of any delinquent owner, at auction, to any person who will pay the assessment and take the lot for the shortest term of years. If the lot of any pier owner shall suffer damage by fault of the owner or his tenants, he shall repair the damage at his own expense; and if he does not repair the same, the superintendent may repair it and charge the expense upon the share of such owner of the money in the hands of the superintendent. No separation by the owner of any lot, of the right to receive dockage, wharfage and canal tolls from the ownership of the lot, shall in any manner affect the rights, duties and obligations created by the deeds. All the covenants and conditions of the deeds are to be construed as running with the land and chargeable thereon. In case of sale, the purchaser takes the lots subject to all the provisions, covenants and conditions in the deed. The plaintiff also proved that the defendants, in the years 1850 and 1851, were the owners of the vessels mentioned in the complaint, navigating the Hudson river, and that the vessels, during those years, entered the Albany basin from the Hudson river, in order to reach the middle or inner docks, for the purpose of receiving

and discharging their cargoes; that on the first of December, 1820, the corporation of Albany passed an ordinance regulating the rates of wharfage at Albany, as follows: *For the season*—for vessels of five tons burthen or under, the sum of $1 per ton; over five tons burthen, 27 cents per ton. *By the day*—for vessels of five tons or under, 10 cents per ton per day; of 20 tons or under, and over five tons, 2 cents per ton per day; between 20 and 40 tons, 1½ cents per ton per day, and for vessels above 40 tons, at the rate of 1¼ cents per ton per day. That this ordinance was in force at the time of the passage of the act of April 5th, 1823, and that up to that time dockage and wharfage had been charged and collected under it; and since the passage of the act of 1823, the rates of wharfage charged and collected by the dock-master at Albany, and divided between the pier owners and the middle dock owners, have been according to the rates established by that act, until the year 1850. That the amount of wharfage chargeable upon the defendants' vessels, pursuant to the act of 1823, was correctly stated in the complaint, and that the amount thereof at the time of the trial was $1,390.83. The defendants proved various grants by the corporation of Albany to Bogert and other middle dock owners, to the effect stated in the answer. They also proved that the act of April 5, 1823, was passed by a majority vote of the houses of the legislature, and not by a two-third vote; that the defendants were the lessees of the middle or inner docks, and occupied them, and that the vessels mentioned in the complaint did not come to, lay at, or make fast to the pier. That the rate of tonnage, wharfage and dockage, as ascertained and laid by the common council of Albany by the ordinance of the 26th of November, 1792, was one shilling per ton for the season, on all vessels over the burthen of five tons, and three farthings a day per ton on all vessels over the burthen of twenty tons, which should not elect to pay by the season, and that the tonnage, dockage and wharfage charged, exacted and paid in the years 1794, 1795, 1796 and 1797, were the same as that fixed by the ordinance of 1792. The evidence being closed, the justice holding the circuit directed a verdict for the plaintiffs for

$1390.83, subject to the opinion of the supreme court at a general term.

J. H. Reynolds, for the plaintiffs.

N. Hill, Jun. for the defendants.

By the Court, WRIGHT, J. Prior to 1798, the corporation of the city of Albany conveyed to sundry persons the franchise of dockage and wharfage in the harbor and port of that city, opposite to and adjoining what were known and called the middle or inner docks. In the conveyances of the franchise the corporation reserved the right of regulating by ordinance the price to be paid for wharfage. In December, 1820, an ordinance was adopted, fixing the rates of wharfage for vessels of five tons burthen or under, *by the season*, $1.06 per ton; and over five tons burthen, twenty-seven cents per ton; *by the day*, vessels of five tons burthen or under, ten cents per ton per day; of twenty tons or under, and over five tons, two cents per ton per day; between twenty and forty tons, one and a half cents per ton per day, and for vessels above forty tons burthen, at the rate of one and a quarter cents per ton per day. This ordinance was in force in April, 1823, and up to that time dockage and wharfage were charged and collected under it.

On the 5th of April, 1823, the legislature passed "An act authorizing the construction of a basin in the city of Albany, at the termination of the Erie and Champlain canals." This act was passed *by a majority vote* in both branches of the legislature. It provided for the appointment of a board of commissioners to raise, by subscription, a sum of money to be expended in the construction of a mole or pier in the Hudson river, within the bounds of the city of Albany, and opposite the docks fronting the harbor, so as to comprise a basin, extending from the state arsenal dock to a point opposite Hodge's dock, on the line of Hamilton street. The commissioners were authorized to circulate the subscription among the citizens of Albany and others disposed to subscribe to the fund: to adopt

all such measures as they might deem necessary and proper for the attainment of the object contemplated; to appoint from their number three acting commissioners, one of whom they were to designate as superintendent of the work, whose duty it should be to collect and receive the moneys subscribed, and to pay the same out to those furnishing materials or performing services for the work. The acting commissioners were to proceed and execute the work, and as soon as it was finished the commissioners of the land office were required to grant, by letters patent to the board of commissioners, or to the survivor or survivors of them as joint tenants, the land under the water of the Hudson river, occupied by the mole or pier, but no wharfage or other charge should ever be exacted from canal boats or other craft, or rafts of lumber entering from the canal and using the waters of the basin, or passing through the same into or from the Hudson river, or for lying along side the pier or bridges, unless the same should be revested in the people of the state. The act further provided, that for all vessels, boats, or other craft, navigating the Hudson river (excepting canal boats) and entering into the basin, there should be paid by the owners or masters of such vessels, &c., for wharfage, a sum equal to double the rates, established by the ordinance of the corporation of December, 1820; the wharfage to be collected by a wharfinger or dock master, who, after deducting compensation for his services, should pay over one half of the residue to the proprietors of the pier, in proportion to the extent of their respective rights and interests therein. The proprietors of the pier were also authorized to charge for all vessels lying in the Hudson river, at and on the east side of the pier, except for vessels paying wharfage for the season in the basin, the like rates of wharfage as were then payable to the owners of the middle docks. As soon as the commissioners of the land office had granted the land under water, the act made it the duty of the commissioners to divide the pier into lots or parcels not exceeding forty feet in width, and sell the same at public auction; the moneys arising from such sale to be divided among the several subscribers to the fund, or their legal representatives, in the same proportions which their sever-

al subscriptions should bear to the entire amount of moneys subscribed and paid in. The grant of the land under water, on which the pier, when erected, was to stand, was to be void if the legislature should, within five years from the first of May, 1823, make provision by law for the re-payment to the commissioners of the amount expended by them in erecting it. The last section of the act provided "that the corporation of the city of Albany shall file their consent to this bill, within sixty days after the passing of the same, with the secretary of state, otherwise this bill shall be void, and the state shall not be liable to the company or to the city of Albany for any thing done by virtue of this act." (*Laws of* 1823, *ch.* 111.)

The corporation of Albany, on the day the act passed, filed their assent to it. The commissioners constructed the pier and divided the same into lots, and in July, 1825, sold the lots at public auction and conveyed them to the respective purchasers. The conveyances, to which the corporation of Albany was a party with the commissioners, among other things provided that the owners of the pier should meet annually and elect a president, secretary and superintendent of the pier; the superintendent to receive all canal tolls payable to the use of the pier owners, and all dockage and wharfage provided by the act, and after making, with the money that should come to his hands for wharfage, &c., repairs needful to keep the pier, streets and bridges at all times in good order, and paying the salaries of himself and his assistants, divide the residue of the funds in his hands annually among the several owners of the pier lots in just proportions. The rates of wharfage and dockage charged and collected by the dock master at Albany, and divided between the pier owners and the middle dock owners, since the passage of the act of 1823, and until the year 1850, were according to the rates established by that act.

In April, 1850, the legislature passed an act providing, that for all vessels, &c. navigating the Hudson river, (except canal boats and other craft using and navigating the canal,) which *shall come to and lie at the pier or mole on the east side of the city of Albany, and on the east side of the pier or mole; and*

for all vessels, &c. (*except canal boats,*) *which shall make fast to the pier on either side thereof*, there shall be paid by the owners or masters of such vessels, &c. certain specified sums for wharfage, being half the amount of the rates fixed by the act of 1823, and to be payable to and collected by the proprietors of the lots on the pier, or to the dock master or agent that they shall appoint for that purpose. The act also provided that no other charge for wharfage should thereafter be exacted by or for the benefit of the proprietors of the pier, on or for any boat, vessel, flat or other craft entering the basin formed by the mole or pier, than such as was expressly allowed by that act; and all laws or parts of laws conflicting with its provisions were thereby repealed. (*Laws of* 1850, *ch.* 158.)

In 1850 and 1851, the defendants were the lessees of the middle or inner docks, and occupied them. They were the owners of certain vessels navigating the Hudson river, and at various times, in these years, these vessels entered the Albany basin from the Hudson river, in order to reach the middle or inner docks, for the purpose of receiving and discharging their cargoes, and did discharge and receive their cargoes at such docks; but at no time did the vessels come to, lie at, or make fast to the pier. The amount of wharfage chargeable, pursuant to the act of 1823, upon the vessels of the defendants, for the seasons of 1850 and 1851, was $1390.83. At the commencement of this suit in 1852, the proprietors of the Albany pier consisted of more than seven persons in number, and the plaintiff was their president. The proprietors, in the name of their president, brought the action to recover wharfage claimed by them under the provisions of the act of April, 1823, accruing in the years 1850 and 1851.

To sustain a recovery, three things must concur: 1st. That the act of 1823 was constitutionally passed; 2d. That that of 1850 is unconstitutional; and 3d. That the action is rightly brought in the name of the president of the pier proprietors. The first two questions relate to the merits; the last to the proper party to maintain the action.

In *Buckbee* v. *Brown*, (21 *Wend.* 110,) it was held that the

right to sue for wharfage was exclusively in the corporation of Albany. The dock master authorized by the act of 1823 to collect the wharfage brought an action against the owner of a vessel entering the basin and lying at the docks of the city; but this court held that the exclusive legal interest in the wharfage being in the corporation of Albany, the remedy for its collection could be only in the name of the corporation. So also in the case of *The Mayor &c. of Albany* v. *Trowbridge*, (5 *Hill*, 71,) the point was raised by the defendants that the action could not be sustained by the corporation, inasmuch as they had no interest in the suit or in the moneys sought to be recovered; but the court held that the legal interest in the wharfage conferred upon the city by their charter was not divested by the act of 1823, and suits for the collection thereof must therefore be brought in the corporate name of the city. Thus, prior to the adoption of the code of procedure, it was settled that the right to sue was exclusively in the corporation. It is supposed, however, that the code has conferred upon the pier owners the right to maintain the action, and that by special statutes, passed in 1849 and 1851, in relation to joint stock and other companies, and associations of seven or more persons in number, it may be brought in the name of the president of such association. The statute of 1849 provided, that any joint stock company or association, consisting of seven or more shareholders, or associates, might sue or be sued in the name of the president or treasurer for the time being; (*Laws of* 1849, *ch.* 258;) and the statute of 1851 extended the provision to any company or association, composed of not less than seven persons, who are owners, or who have an interest in any property, right of action or demand jointly or in common, or who may be liable to any action, on account of such ownership or interest. (*Laws of* 1851, *ch.* 455. These statutes conferred upon the plaintiff no right to sue, except in cases where the shareholders or associates could before have prosecuted. Their intent was to obviate the inconvenience of joining all the shareholders or associates as parties; to facilitate an existing right of action, and not to create a new one. The plaintiff, by virtue of those statutes, can only bring such actions as

the pier owners could have maintained before; and prior to their adoption, and under the act of 1823, the pier owners could not sue persons entering the basin, for wharfage. The plaintiff's counsel conceded on the argument, that if, after the passage of the code, the action could not be sustained by the pier owners, it cannot be sustained in the name of their president.

The code changed the rule in relation to parties to actions; adopting, with slight modification, that which formerly obtained in courts of equity. It provided that *every* action *must* be prosecuted in the name of the real party in interest; except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. (*Code*, §§ 111, 113.) The real party in interest is the person for whose benefit the action is prosecuted, and who is to reap the fruits of the litigation. The right of the corporation of Albany to sue for wharfage resulted from the common law doctrine of its being the technical owner. It has no real interest in the moneys to be collected for wharfage, as after the passage of the act of 1823, one half belongs to the pier owners and the other half to the middle dock owners. All the interest it may be said to have is as trustee, clothed with the duty of collecting and paying over the wharfage to the pier and dock owners, after deducting the compensation of a dock master. The act of 1823 directs the dock master, after collecting the wharfage from persons entering the basin, and deducting therefrom a compensation for his services, to pay over one half of the residue to the proprietors of the pier in proportion to the extent of their respective rights and interests therein. The pier owners are, therefore, the persons really interested in one half of the wharfage, after deducting the compensation of the wharfinger, and are to that extent the persons for whose benefit the action is to be prosecuted; and being so, it is contended that they may, under the provisions of the code, making it obligatory that the party to the record shall be the real party in interest, maintain the action. But are the pier owners, "the real parties in interest" within the meaning of the statute, capable of prosecuting this

action in the form in which it has been brought? The code provides that a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. This provision is permissive in its character, and its effect is not to exclusively limit the right to sue to the trustee or the person authorized by statute. A *cestui que trust*, being the real party in interest, may bring an action in his own name, but for convenience he is allowed to bring it in the name of his trustee. This he may waive. The corporation of Albany is not by the express terms of any statute authorized to sue, (the authority being only implied from the duty of collecting which the statute enjoins,) and hence if the code in such case limited the right to sue to the person authorized by statute, the provision could not affect this case. The corporation, however, under the act of 1823, may be regarded as the trustee of an express trust. They are to collect the wharfage, and distribute it among the pier and dock owners; but though they may maintain an action, without joining with them the *cestuis que trust*, the provision is not a positive prohibition against the latter, under any circumstances, bringing the suit themselves. The 113th section of the code is not, therefore, in the way of the pier owners being the proper parties to sue, provided they are the "real parties in interest" contemplated by the 111th section, and sue in the right form.

The action is brought by the pier owners as an association, or by the plaintiff in their behalf, for their portion of the wharfage. Prior to the act of 1823, the dock owners were entitled to the wharfage collected by the corporation. The act of 1823 doubled the rates then payable to the dock owners, and practically separated the rights of the pier proprietors from those of the dock owners. It imposed an obligation on those entering the basin, to pay the prescribed rates of wharfage; and the agent of the corporation was required to pay over one half of the money collected to the pier proprietors, without regard to the claim of the owners of the middle docks. To hold that the pier owners may maintain the action for their part of the wharfage would not lead to the absurd and mis-

chievous consequences apprehended, of severing the obligation to pay, contracted by those entering the basin, and subject them to suits by each dock owner for his share of the wharfage. But, for aught that I can perceive, it would practically repeal by *implication* so much of the act of 1823 as directs the agent of the corporation to collect and distribute the wharfage; and would subject those entering the basin to a second action or distress by the corporation, notwithstanding any recovery by the pier proprietors. It may possibly be that a recovery by the pier owners would be a good answer to an action on the part of the corporation, and that a court of equity would restrain the collection by distress of the pier owners' share of the wharfage, for which they had already recovered. These, however, are but some of the consequences growing out of permitting a *cestui que trust*, instead of the trustee, to enforce the trust. It is said, also, that it would impose on all entering the basin the necessity of ascertaining who the distributees were, and the amount due each, or of refusing payment at their peril. But there is no difficulty of this kind. Those entering the basin may voluntarily pay to the dock master, and that discharges their liability.

There can be no doubt of the right of the corporation to sue for wharfage, even since the code. They are the trustees of an express trust, and as such may maintain the action without joining with them the *cestuis que trust.* The pier proprietors, if *as an association* they were really and exclusively interested in the claim sought to be recovered, we think, since the code, might also sustain the action. It would be safer, perhaps, in the latter case, to unite with the corporation, but it is not absolutely required. Still there seems to me a fatal objection to sustaining this action in the present form. The act of 1823 imposes on the corporation the duty of collecting the whole wharfage from those entering the basin, a moiety of which is to be paid to the pier proprietors, but not as a company or association. The entire moiety is not to be paid by the corporation to an association, leaving to the association the further duty of distributing it amongst its members. The corporation itself, through its agent, the dock master, is to distribute the fund,

not in gross to an association of persons, but singly to each proprietor, to the extent of his right or interest therein, so that the interest in, and ownership of, the fund, when distributed, is *not joint, but several*, each pier owner being a distributee, and receiving and holding his share not in common but separately. There are as many separate interests in the fund as there are pier owners or distributees.

This action is brought in the name of the president of an association, to recover an entire moiety of the wharfage, though the association is not, jointly or in common, either entitled to, or interested in, the right of action or demand. It is only in cases where the association, as such, is the owner, or has an interest, joint or in common, in any property, right of action or demand, that a suit may be maintained in the name of the president of the association. The statutes of 1849 and 1851 thus limit the right. The separate owners of demands, or of separate rights of action, cannot voluntarily associate and elect a president, and, under the statutes of 1849 and 1851, recover in the name of such president, in one suit, the separate demands. As well might the proprietors of lots upon the pier maintain an action in the name of their president, to recover any other separate demand as that of wharfage, which, when distributed, is not the joint or common property of an association, but received and held separately by each proprietor. Nor have the pier owners themselves agreed, if they could do so, to throw their respective interests, upon the receipt of the wharfage, into common stock; for in the deeds of conveyance of the pier lots, which seem to be the only articles of association, whilst there is a provision for the election of a superintendent to receive all canal tolls payable to the use of the pier owners, and all dockage and wharfage provided by the act of 1823, he is to divide the residue of the moneys that may come into his hands for dockage and wharfage, (after deducting cost of repairs and compensation for his services,) among the several owners of pier lots, in just proportions.

This objection, however, has relation only to the parties who may rightfully prosecute the claim, and the form in which the

action is brought, and not to the merits. As the objections may, hereafter, be obviated, by commencing actions in the names of the parties entitled to sue, it is proper that the merits should be examined, with the view of determining whether the claim can be enforced against the defendants, under any circumstances.

If the pier proprietors can recover at all, it is by virtue of the provisions of the act of 1823. Any right they may have is exclusively derived from the legislature, and under that enactment. That act assumed to fix unalterably the rates of wharfage in a part of the harbor of Albany, and bestow half of it on the persons who should subsequently become the owners of pier lots. If it were a constitutional exercise of legislative power, and the act has not been, so far as it affected the right to claim wharfage from the owners of the middle docks, repealed, then the defendants, though lessees of the middle docks, would be amenable on entering the basin, with a view of reaching their own docks to receive and discharge cargoes, so that if the question of the constitutionality of an act of the legislature be always a grave one, it is of especial importance to the defendants in this case, as the legislature assumed to authorize the construction of a pier in front of their docks, thus forming a basin between the docks and the pier, and arbitrarily imposed on them a toll or charge for entering such basin to reach their own docks.

The 12th and last section of the act of 1823, as we have seen provided that the corporation of the city of Albany should file their consent to the bill, with the secretary of state, within sixty days after the passing of the same, otherwise the bill should be void. The act, therefore, it is urged, was passed on condition that it should not be a law unless the corporation consented, which was not a constitutional exercise of legislative power. The constitution of 1821 vested the whole legislative power in the senate and assembly, subject to the qualified veto of the governor. (*Const. art.* 1, §§ 1, 12.) A statute that is not an expression of the legislative will alone, has no binding force as a law. It can only become a law, mandatory and obligatory upon those who are the subjects of it, by a declaration of the legislative will. An attempt, therefore, to call in another party to aid in

the business, and divide the responsibilities, of legislation, so that the act shall not be the single expression of the legislative will, but the sovereign function is discharged in part, at least, by a party unknown and unrecognized by the fundamental law, would be in contravention of the constitution and render the act void. But this should be patent and manifest on the act itself. Now, was not the act of 1823 an expression of the legislative will alone? We think it was. The sovereign function of legislation was discharged by the senate and assembly, unaided by the corporation of Albany. They passed the act without submitting the question to the corporation, and it was not within the scope or object of the legislature to shirk exclusive responsibility. They did not assume to delegate to the corporation the power to enact the law, nor call the corporation in to aid in its passage, or in any way to divide the responsibility of that act. It is true, the 12th section provides that the bill shall be void, unless the corporation of Albany file their assent to it within sixty days after its passage. But this was the unaided act of the legislature, and as much an expression of the legislative will alone, as any other provision of the bill. That the legislature may constitutionally pass a law, and provide that it shall take effect at some future period or upon the happening of some future event, we cannot doubt. Indeed, we entertain no doubt of their constitutional power to declare that an act passed by them shall cease to exist as a law, unless, within a specified period, an act specified in it to be done shall be performed by the person or body to be affected by it. The case of *Parker* v. *Commonwealth*, (6 *Barr*, 507,) is not opposed to this view, even if the ground of that decision be not subsequently overruled by the same court in the *Commonwealth* v. *Quarter Sessions*, (8 *Barr*, 391,) and the *Commonwealth* v. *Parker*, (3 *id.* 214.) In the *Commonwealth* v. *Quarter Sessions*, the same judge who delivered the luminous and admirably philosophical opinion of the court in *Parker* v. *Commonwealth*, took occasion to say that the only principle settled in the latter case was, that the general assembly of the commonwealth could not delegate to the people a power to enact laws by the exercise of the ballot; and

it was held distinctly that the legislature might repeal a law through the secondary means of a popular vote. Nor are the cases of *Thorne* v. *Cramer*, (15 *Barb.* 112;) of *Bradley* v. *Baxter*, (*Id.* 122,) and of *Barto* v. *Himrod*, (4 *Selden*, 483.) in hostility to the principle that the legislature having, unaided, passed a statute, assumed the exclusive responsibility of bringing it into existence as a law, and expressed the legislative will alone, may annex to it a provision that the law shall cease to exist unless a party, in some degree to be affected by it, shall, within a limited period prescribed by the legislature itself, perform an act, also prescribed in the statute. Those were all cases arising under the free school act of 1849. A bill having in view the establishment of free schools throughout the state, had passed through the forms of legislation. In the bill itself there was a provision that the electors of the state, at the annual election to be held in November following, should determine by ballot, *whether the act should or should not become a law*, and it further provided for submitting the question to the people through the ballot box, and in case a majority of all the votes in the state should be cast against the new school law, the act should be null and void, and in case a majority of all the votes should be cast for the new school law, then the *act should become a law* and should take effect, &c. All that was done in the supreme court in the cases of *Thorne* v. *Cramer* and *Bradley* v. *Baxter*, was to apply to this school act, and we think correctly, the principles that the legislature could not delegate to the people the power to enact laws by the exercise of the ballot, and that an act is without efficacy as a law, which is not an expression of the legislative will alone. The legislature had attempted to throw off all responsibility and avoid the exercise of all law-making power, casting the power upon the people, which they had voluntarily surrendered and exclusively vested in a senate and assembly, by the adoption of the constitution. All that the legislature did, was to draft and perfect the details of a bill. The question whether it should become a law or even find a place upon the statute book, was wholly submitted to the electors of the state. If enacted, it was the act of the people

hrough the exercise of the ballot, and an expression of the popular, and not the legislative will. The power of legislation was virtually yielded back to the people to be exercised in a form and in a mode in contravention of the fundamental law; the legislature not advancing a step towards a declaration of its will, nor intending to do so. In *Barto* v. *Himrod*, a case in the court of appeals, the decision did not necessarily turn upon the constitutionality of the school act. The act had not prescribed the evidence by which it was to be known whether it took effect or not. The result of the popular vote was neither admitted by the pleadings nor established by the evidence. There was a total defect in the proof that the act had been adopted by a vote of the people. "We should, therefore," says the learned chief judge, "be compelled to affirm the judgment of the supreme court for the want of this proof, whether the law is valid or not." But he proceeds to discuss the question whether, what was called a statute was ever "enacted in form or spirit according to the constitution," and arrives at a similar conclusion, and upon similar grounds with the supreme court, that it never took effect as a law, although it may have had the vote of the people in its favor. The proposition is conceded by the judge, that a valid statute may be passed to take effect upon the happening of some future event, certain or uncertain, if, when it comes from the hands of the legislature, it be a law *in presenti;* in other words, if it be the act of the legislature and the embodiment and expression of its will alone, and it has definitely and finally exercised its judgment on the subject matter of legislation. If the law emanates from the legislative will alone, and has an existence from that single source, it becomes a mere question of expediency when and how it shall cease to exist, upon which question the legislature may properly exercise its judgment, and having exercised and given expression to it in the statute, the statute is not for that reason invalid. No third party, unrecognized by the constitution, is called in to enact the law and give it vitality. No action is required, other than that of the legislature, to give it being as a law. We think that the expression of the legislative will, in the last section of the act of 1823, that the law

should cease to exist, unless the corporation of Albany filed their assent to it within a specified period, did not render the act in valid. As the act contained various provisions affecting commerce and other interests of the state, it may have been unwise legislation to provide that the law should cease to exist, unless a party affected by it performed an act evincing consent to its provisions, but it was not an unconstitutional exercise of legislative power.

The act of 1823 was passed by a majority vote. The constitution of 1821 provided that the assent of two-thirds of the members elected to each branch of the legislature should be requisite to every bill appropriating the public moneys, or property, for local or private purposes, or creating, continuing, altering or renewing any body politic or corporate. (*Const. Art.* 7, § 9.) There is nothing in the act purporting to appropriate public property for local or private purposes, unless it be the provision in the 5th section, authorizing and requiring the commissioners of the land office, in a certain contingency, to grant to the commissioners for the construction of the pier, the land under the water of the Hudson river, occupied by the pier and sloop lock. This grant was to be made upon the pier and sloop lock being finished, forming a basin which by a subsequent section was practically made a part of the canal; and this basin, so far as it concerned boats and other craft using and navigating the canal, was to be exclusively controlled by the state officers, the latter charging and recovering tolls on canal boats entering it, in the same manner as if it were a part of the canal; and no tolls were to be exacted, or any charge for wharfage made on canal boats or other craft, entering from the canal and using the waters of the basin, or passing through the same into or from the Hudson river, or for lying alongside the pier, unless the same should be revested in the people of the state. The land under water was within the boundaries of the city of Albany, but may be regarded as held by the state by the right of eminent domain. In this view, and no other, it was public or state property. The commercial and other interests of the state were to be promoted by the construction of a pier in the Hudson

river, and the state was not then disposed to do the work. It was willing, however, to aid the construction by private enterprise, and make a conditional grant of the land under water on which the pier and sloop lock should be erected. We do not think that this was appropriating public property for local or private purposes, within the sense and meaning of the consti tution.

But it is urged that the act was passed in violation of the constitutional provision requiring the assent of two-thirds of the members elected to each branch of the legislature to a bill *altering* a body politic or corporate; and that by the act in question, the powers previously possessed by the corporation of the city of Albany were essentially altered.

The mayor, aldermen and commonalty of the city of Albany are a public corporation. Public as well as private corporations are within the constitutional provision. This question has been the subject of considerable discussion, but is now definitely settled. (*Purdy* v. *The People*, 4 *Hill*, 384. *Stanton* v. *Stanton, MS. opinion of Mr. Justice Beardsley, in supreme court.*) The only question, therefore, on this branch of the case is, was the corporation of Albany *altered* by the provisions of the act? Any act which affects the powers of a municipal corporation by enlarging or abridging them, or applying them to new subjects, or authorizing their exercise on new occasions, or in new modes and forms, *alters* the corporation, and is within the constitutional restriction. A body politic or corporate can be altered in no other way than by adding to or taking from its powers. (2 *Hill*, 42, *per Bronson, J. Purdy* v. *People*, 4 *Hill*, 384. *Stanton* v. *Stanton, Sup. Ct. opinion by Beardsley, J., afterwards affirmed on error, MS. Green* v. *Biddle*, 8 *Wheat.* 2, 84, 85.) But as general propositions these were admitted in the argument at bar. Their application to the case in hand was the contested question.

That the legislature acted upon the supposition that the act in some way affected the powers of the corporation of Albany, is apparent from the concluding section, declaring that it should cease to exist as a law, unless the municipal government filed

its consent within sixty days after its passage; and that failing to do so, the state should not be liable to the city for any thing done by virtue of the act. The idea that the act in its whole scope and nature is merely a compact between the state and a subordinate party, (the common council of the city of Albany,) and that it does not profess to have the character of law in respect to those features affecting the corporation in its legislative and executive character, is more fanciful than sound. It either altered the corporation or it did not; and the objection that it falls within the constitutional restriction, can as well be taken by the defendants as by the corporation itself.

Prior to the act of 1823, the corporation, by its charter, was authorized to regulate the manner of constructing wharves and slips within the bounds of the city; it had also the right to charge, collect and receive wharfage from all boats and water craft lying at the wharves or anchored in the port opposite thereto. The common council possessed the power to regulate by ordinance the rates of wharfage, and the manner in which it should be collected; to establish and regulate docks and wharves, or whatever might be necessary, in and about the same; and their jurisdiction extended on the east to the line of Rensselaer county. (2 *R. S.* 469. *Hunt* v. *Mayor &c. of Albany*, 3 *Paige*, 213. *S. C. in error*, 9 *Wend.* 571.) They had no power to construct a pier or basin in front of the docks of the city, or do any thing towards its construction, or improve the basin after the work was completed either by the state or individuals. It is true that the case shows that the corporation had sold all its interest in the wharfage when collected; reserving, however, the right and power to regulate the rates, and how it should be collected. Now did the corporation possess the same rights and powers subsequent to the passage of the act of 1823? Did the act alter, enlarge or abridge them; or extend the corporate powers to new subjects, and authorize their exercise in new modes and forms? If so, then it *altered* the corporation, otherwise not. In the cases heretofore decided, it is assumed and conceded that the act in question did alter the corporation, though the effect of such alteration upon the con-

stitutionality of the act itself was not the point in judgment. In *Hart* v. *Mayor &c. of Albany*, (3 *Paige*, 213,) the chancellor says: "The act of 1823 which directs the manner of constructing the basin and pier, and makes a different disposition of a part at least of the wharfage, is inconsistent with the former rights and powers of the corporation." In the same case on error, Mr. Justice Sutherland remarks: "The act in some respects does limit the power and affect the previous rights of the corporation." (9 *Wend.* 586.) We think that it is a question admitting of no real doubt, that when the act left the hands of the legislature and became a law, the corporation was shorn of some of its former power, and that in one or two respects, new powers and duties were imposed. Before the act, and the construction of the basin under it, the corporation had power to charge and impose anchorage and wharfage on all descriptions of water craft lying at the wharves or in that part of the river opposite thereto, whether used upon the canal or not. It was abridged of this power by the express terms of the law, which provided that no wharfage or other charge should ever be exacted from canal boats or other craft entering from the canal and using the waters of the basin, or passing through the same into or from the Hudson river, or for lying alongside the pier or bridges. So also, before the act, the corporation possessed the power of regulating the rates of wharfage by ordinances made from time to time in view of the exigencies of commerce. The act took this power away, and fixed the rates unalterably. It was the clear intention of the legislature, which the act successfully carries out, to destroy the power of the corporation ever to legislate as to the rates of wharfage; and, to secure a benefit to individuals that should engage in the enterprise of constructing a pier, by fixing the rates unalterably through the exercise of state legislative power. So also, before the act, the corporation had the power to appropriate the wharfage as it deemed best. This power it had attempted to exercise in respect to the middle or inner docks. The act stripped it of the power and compelled payment of one half of the wharfage to persons designated by the legislature. The powers of a collect-

ing agent or trustee for the pier owners was conferred on the corporation, and it was compelled to assume the responsibilities of that mere private relation. The act compelled it to discharge its duty in this respect through a dock master or wharfinger, and took away its right of doing so through another officer, however expedient. That question was no longer to be submitted to the judgment of the common council, the legislature assuming to decide it once for all time to come. Thus the act abridged the powers of the corporation in some respects, and in others enlarged its powers, and applied them to new subjects, and thereby altered it. In *Stanton* v. *Stanton*, (which was a case growing out of the work authorized by the act of 1823,) this question of what would amount to an alteration of the corporation was involved. The basin formed by the construction of the pier had filled up so that its beneficial use to the state and others was measurably impaired. The pier owners who claimed and exacted one half of the wharfage for entering the basin, and canal tolls, likewise neglected or refused to improve it. In 1835, the legislature passed an act, by a majority vote, authorizing the common council of Albany to make an additional opening in the pier, and to excavate and clean the basin with the view of improving its navigation; the expenses of which improvement were to be assessed and apportioned upon such real estate as was deemed to be benefited thereby. These assessments were, by the act of 1835, and others amendatory thereof, declared to be a lien upon such real estate, and if not paid were ultimately to be collected by the corporation by a public sale of the lands so charged. The defendant's lot was assessed and sold under the assumed authority. The only point insisted on by the defendants was that the acts altered the powers of the corporation, by extending them to new subjects, and authorized their exercise in new modes and forms, and not having been passed by a two-third vote were void, and that necessarily all acts and proceedings of the corporation under them were invalid. The supreme court held, and its decision was subsequently affirmed by the court for the correction of errors, that the acts altered the corporation of the city. "True," says Mr. Justice Beardsley,

"it was a body politic before, and these acts would make it no more. It would still be unchanged in its existence, but its attributes would be changed, and that change would necessarily be an alteration of the corporation itself." (*See MS. opinion of Beardsley, J., in Stanton* v. *Stanton; Laws of* 1835, *p.* 191; *Id.* 1836, *p.* 186; *Id.* 1837, *p.* 519.) This decision led to the passage of the act of 1849, providing for the indemnification of the city by the state; the payment of a specific sum to the pier owners in lieu of tolls as before paid on canal boats, and repealing so much of the act of 1843, as directed canal tolls to be collected and paid to the pier owners; the confirmation of the grant of the land under water on which the pier stood; the transfer of the ownership of the basin to the state, and devolving its care and charge upon the canal commissioners, and the keeping of the pier in good repair on the owners of the pier. (*Laws of* 1849, *ch.* 200.)

The act, therefore, in our opinion, *altered* the corporation; and it was passed by a mere majority vote. But it is urged that the corporation consented to the act; that it is to be regarded and treated as a compact between the state and the common council; that the legislature being desirous to subserve the exigencies of commerce by authorizing the erection of a pier by private enterprise, made certain propositions to the common council, to which their assent was necessary and was required; that with respect to these the act does not profess to have the character of a law or enact the provisions by its own force; that the consent given by the corporation had all the effect of an ordinance of the common council and in fact was one; that the provisions derive their validity wholly from the act of the corporation in assenting to them; and that the common council by assenting have waived all objections to the constitutionality of the act, and that no other person can make them. We have already said that the plaintiff *claiming to recover* under the act of 1823 alone, *the defendants may rightfully raise the question of its constitutionality upon any ground;* and the propositions embodied above with respect to the character of the act, and the effect of the consent of the common council, have certainly the

merit of novelty. The idea that the common council by giving their consent had actually exercised legislative power; that what the legislature did, so far as the rights and powers of the municipal government were to be affected, was the act of the common council alone, and that the law possessed a semi-character, partly enacted by the state legislature, and partly by the common council of the city of Albany, is quite novel; but its novelty is all that it has to rest on. The law was the sole offspring of a majority of the legislature, and if the consent which it required from the common council transformed the thing into a compact, the effect of which was an alienation by the corporation of some of its powers, a question would arise whether the corporation could alienate any of its legislative or executive powers and duties by *contract, by law, or otherwise*, except under the authority of a statute passed by a two-third vote. We think it could not. In the case of the *Presbyterian Church* v. *Mayor &c. of New York*, (5 *Cowen*, 538,) it was expressly determined that the corporation could not abridge its legislative powers by contract. So also in *Gozzler* v. *Corporation of Georgetown*, (6 *Wheat.* 593,) Marshall, C. J., observed: "A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abrogate its legislative powers." In *Britton* v *Mayor &c. of New York*, it was held that it was incompetent for the corporation to tie up or embarrass the execution of its public duties, whether legislative or executive, by contract or otherwise; that it was not in the power of the common council to bind its legislative capacities by any private arrangements or stipulations, so as to disable itself from enacting any law that might be deemed essential for the public good. (*MS. opinion of Nelson, C. J., in Britton* v. *Mayor &c.*) These propositions require no argument. If a corporation may by contract, by law or otherwise, alienate its legislative powers and duties, there might soon be an end to all legislation under its charter. "If

it were practicable," says Nelson, C. J., "for the common council to divest themselves of all power and discretion over any one public duty of which they are the sole depositary by the charter, and to place it permanently in the hands of another, I do not see but the same thing might happen to all. It would be impossible to distinguish. A consideration of the nature of the duties, and the object and purpose for which granted, forbid all idea of any power on the part of the corporation to divest itself of the right to exercise a constant control and supervision over the execution of them." (*See Auburn Academy* v. *Strong*, 1 *Hopkins*, 278.) So that construing the consent of the corporation of Albany to the act of 1823, as an executed agreement to alienate its legislative and executive powers, having no power to do so, it would add nothing to the validity of the statute, or make constitutional what was before an unconstitutional exercise of legislative power.

But we think that if the common council had possessed the power to consent to an act altering the corporation, such consent would not obviate the objection that the act was passed by a majority vote. The constitutional provision does not except bills passed on condition that the corporation shall consent, but applies universally to *every* bill altering a body politic or corporate. The object of the provision was not merely to secure corporations from legislative attacks, but also to protect the corporators and the public; and it would be rendered comparatively useless by excepting cases, when those who wield the corporate power for the time being consent.

Our conclusion is, that the act of 1823 altered the corporation of Albany. This seems to be the view entertained heretofore by those judges who have taken occasion to speak on the subject. It is quite apparent also, that the legislature supposed that they were by the act altering the corporate powers of the city, but that if the corporation consented it might be constitutionally passed by a majority vote in both houses. The act does not appear to have received the assent of two-thirds of the members elected to each branch of the legislature, and was not therefore passed in accordance with the constitution. It is

inoperative and void. As the plaintiff claims to recover wharfage from the defendants by virtue of the provisions of that act, it necessarily follows that the action is not sustainable.

The ownership, care and charge of the basin, having been, in 1849, transferred to the state; the pier owners released from any obligation in respect to it; a gross sum of thirty thousand dollars being paid to them by the state in lieu of canal tolls which they claimed to receive under the act of 1823; the grant of the land under water on which the pier was erected being confirmed to them; their claims against the state liquidated and no duty charged on them, except to keep the pier in repair; the legislature passed the statute of 1850, releasing all vessels navigating the Hudson river and entering the basin, from the payment of wharfage to the pier owners, unless they came to, laid at, or made fast to the pier on either side. If this were a constitutional act, then the defendants are not liable, as their vessels, although they entered the basin, at various times, in the seasons of 1850 and 1851, did not come to, lie at, or make fast to the pier. The act is not liable to the objection that we have just been considering, as the restriction was removed by the constitution of 1846. It is urged, however, that it conflicts with the provision in the constitution of the United States, which forbids a state from passing any law impairing the obligation of contracts. (*Const. U. S. Art.* 1, § 111.) The argument is, that the act of 1823 was in effect a contract between the state and the pier owners, assented to by the city of Albany, by which, in consideration that the pier owners would erect a pier and thereby form a basin, they should be entitled to, and receive, certain wharfage from vessels entering the basin and lying in it; that this contract was complete and executed prior to the act of 1850, which attempts to repeal and rescind, and not merely impair, but utterly destroy its obligation. If the premises on which the argument is based be correct, and there was a valid and subsisting contract between the state and the pier owners in 1850, by which the latter were entitled to claim wharfage from any vessel entering the basin from the Hudson river, the statute of 1850 would fall within the constitutional restriction,

and be necessarily void. But can the act of 1823 be fairly construed as a contract between the state and the pier owners? The pier, by the terms of the act, was to be constructed by commissioners named in it, who were primarily to raise the funds by voluntary subscription of individuals in Albany or elsewhere. These subscribers were to be reimbursed by a sale of the pier after it had been finished and divided into lots. The persons who might become purchasers at the sale were not restricted to those originally subscribing to the fund for its erection. The purchasers of lots were not organized into a company or association; and the state did not profess to deal with them in the accomplishment of the work contemplated by the act. There was no contract therefore, in terms, between the state and those who should purchase and hold pier lots; and I cannot well perceive how one can be implied. True, the act established certain rates of wharfage to be imposed on vessels entering the basin, to be collected by the corporation of Albany, and a moiety thereof distributed among those persons who should subsequently become purchasers and proprietors of pier lots; but the pier, in accordance with the act, was to be built by commissioners, from funds voluntarily subscribed, and the subscribers reimbursed by a sale of it in lots. This was done, and it may well have happened under the provisions of the act, that not a single original contributor became, on a sale of the pier, a proprietor. How, therefore, can it be said that a moiety of the wharfage was, in contemplation of the legislature, to form any part of the consideration for the erection of the pier and the consequent formation of the basin? Or, how can any contract be implied between the state and the subsequent purchasers of pier lots? Certainly, not legitimately from the terms and provisions of the act. The act was singular in its features. Looking at it, at this distant day, we can scarcely avoid the conclusion that the legislature aimed to approach as nearly as possible to the creation of a corporation to construct the work, without actually creating one, as that would require a two-third vote, which, probably, it was impracticable at the time to secure. The act did not profess to incorporate the original subscribers to the fund

for the erection of the pier, or those who subsequently became purchasers. In its provisions it lacked the legal characteristics of a contract between the state and those who should become purchasers of pier lots. The state being unwilling to erect the pier as a public work, was disposed to give encouragement thereto as a private enterprise. Hence, as an inducement to subscribe to the fund for its erection, (and it may be with the latent expectation that the original subscribers would be the eventual owners of the work,) the rates of wharfage were doubled, with a provision that one half should be paid to the proprietors of pier lots. This provision is rather to be regarded in the light of a gratuity or bounty offered on the part of the state to those persons who would engage in the enterprise, than constituting any part of the consideration of a contract for the erection of the pier. As I regard the act of 1823, a contract between the state, the city of Albany and the pier proprietors cannot be deduced from any reasonable construction of it, even if that act were deemed to have any validity; so, that the act of 1850, granting the right to vessels to enter the basin without the payment of wharfage, for so entering, after the basin had become the exclusive property of the state and the pier owners had released any interest they had therein, pursuant to the provision of the act of 1849, did not fall within the restrictions of the federal constitution. Indeed, the very able counsel who argued the case at bar on behalf of the plaintiff, scarcely alluded to the objection, though appearing in the printed points of a distinguished lawyer, who, since the argument, has departed from our midst, bequeathing to us the accumulated fruits of his vigorous intellect and unparalleled industry. It was urged, principally, that the act of 1850 is made a part of the act of 1823, and is liable to all objections raised against that act.

But as a matter of fact, it is not true that the act of 1850 is made a part of that of 1823. It undertook to repeal so much of the act of 1823, as gave any wharfage for entering the basin to the proprietors of pier lots, unless the vessels came to, laid at, or made fast to the pier on either side. But it was not in

terms or otherwise made part of the act of 1823. Nor is it liable to what we deem a valid objection to the act of 1823. It was passed since the adoption of the constitution of 1846, abrogating the provision contained in that of 1821, requiring the assent of two-thirds of the members elected to each branch of the legislature to a bill altering a body politic or corporate A majority vote of all the members elected to each branch of the legislature was then sufficient. But assuming the ground taken by the plaintiff's counsel, that the act of 1823 was constitutionally valid, then the only objection that can be raised to the validity of the statute of 1850, is that it impairs, by destroying, the obligation of a contract entered into between the state, the corporation of Albany, and the pier owners, by which it was agreed that the pier owners for all time to come were to receive a moiety of the wharfage, fixed by the act of 1823, as a consideration or compensation for erecting the pier. We do not think that the act of 1823 is evidence of any such contract. It follows that the statute of 1850 is valid, and therefore, even if we were mistaken in our view of the constitutionality of the act of 1823, as the defendants' vessels did not come to, lie at, or make fast to the pier on either side, there can be no recovery by the pier owners against them.

There should be judgment for the defendants.

[Albany General Term, September 1, 1856. *Harris*, *Wright* and *Watson* Justices.]

D'Ivernois and Dorler *vs.* D. & R. Leavitt.

23 63
29 543
21a 172
22a 339

The rights relating to the acquisition, enjoyment and disposition of real property are prescribed and regulated, exclusively, by the laws of the country in which the property is situated.

Every community, independent and sovereign, possesses this power, as an inherent and essential element of its sovereignty. And no other community can interfere with the method by which real property may be acquired or lost, the

tenure by which it may be held, the duration or quantity of interest in it, or the conditions to which the enjoyment of it is subject.

Yet an instrument purporting to dispose of real estate situated in another state or country may be within the reach of the laws of the state in which it is executed, and may be assailed on the ground that such instrument was in fraud of the citizens of that state, or that it was obtained from the grantor fraudulently.

Therefore, an assignment, executed by debtors residing in this state, for the benefit of their creditors, although it relates to, and embraces, real and personal property in other states, may, if our law deems it fraudulent, be declared void, by the courts of this state.

An assignment which authorizes the trustee to sell the assigned property *upon credit*, is fraudulent and void, as against the creditors of the assignors.

An assignment will also be rendered void by a provision which allows the assignee to withhold the division and distribution of the assets for any length of time which he, in his discretion, may think proper.

A judgment, confessed in favor of a creditor to whom the debtor has previously assigned his property in trust for the benefit of creditors, the assignee being among the number, and who still claims under the assignment and seeks to enforce it, is fraudulent and void. If the creditor would enforce the judgment he must abandon the assignment. ROOSEVELT, J., dissented.

Where a sale of personal property is made, and the property is delivered, in another state, and a bill of sale and inventory are also made out, and delivered, there, the validity of the transaction, both as to the sale itself, and the extrinsic acts, simultaneous with or subsequent to it, must be determined by the laws of that state. The courts of this state have no jurisdiction.

IN EQUITY. This was an appeal by the plaintiffs from a judgment or decree in equity, entered at a special term. On the 29th of March, 1845, the mercantile firm of J. W. & R. Leavitt, in the city of New York, suspended payment and became insolvent, being indebted to the defendant David Leavitt, for money lent and advanced by him to said firm, $70,948.16. A portion of this indebtedness was secured by mortgage, executed by John W. Leavitt. Before their failure, David Leavitt had incurred liabilities, on their behalf, to aid them in their business, which liabilities existing at the time of the execution of the assignments hereinafter mentioned, amounted in the aggregate to the sum of $106,124.29. and were all paid by him. This firm at different times, before their failure, hypothecated to David Leavitt, as security for his loans and advances, certain debts, claims and property which are mentioned in schedule

C; and on the 29th of March, 1845, they hypothecated to him, as further security for such loans and advances, the surplus of all securities belonging to them, lodged with the American Exchange Bank, after the payment of their indebtedness to said bank. On the 29th day of March, 1845, the said John W. Leavitt and Rufus Leavitt and Frederick T. Mygatt, by deed of assignment of that date, assigned to David Leavitt and Joseph C. Vandervoort, upon certain trusts, for the benefit of creditors, all their joint and several property and estate, within the state of Louisiana, and all merchandise, moneys, credits and effects, belonging to them, or either of them, in the possession of any firm or party in New Orleans. On the first day of April, 1845, the said John W. & Rufus Leavitt executed to the said David Leavitt and Joseph C. Vandervoort, six other deeds of assignment, upon certain trusts, for the benefit of their creditors, by which the assignors conveyed all their lands and real estate, situated in the states of Alabama, Michigan, Kentucky, Indiana, Tennessee and Illinois. On the same day, the same parties executed to the said D. Leavitt and Joseph C. Vandervoort another assignment of book accounts, debts, &c. for the benefit of their creditors. On the 2d day of April, 1845, the same parties executed to the said David Leavitt another assignment of certain specified claims, for the benefit of their creditors. On the 5th day of April 1845, they executed to the said David Leavitt and Joseph C. Vandervoort another assignment of hypothecated notes, for a similar purpose. On the 25th day of April, 1845, they executed to said David Leavitt an assignment of real estate, in the city of New York, for a similar purpose. The leasehold premises on Barclay street, embraced in this assignment, were subject to a mortgage executed by John W. Leavitt to David Leavitt, on the 19th of October, 1842, to secure the payment of $20,000, the lien of which mortgage was preserved in and by said assignment. On the 26th of June, 1845, John W. Leavitt was, and for several years previously had been, a resident of Weehawken, in the state of New Jersey, and was the owner and in possession, at that place, of certain personal property. On that day he sold said property to David

Leavitt, at a valuation, who credited the firm with the amount at which the property was appraised. This property remained at Weehawken, in the possession of John W. Leavitt, upon hire, until May 1, 1847, when he removed to the city of New York, and the property, with the farm, was rented to R. Cochran, who afterwards bought it. On the 31st day of July, 1845, J. W. & R. Leavitt executed to said David Leavitt another assignment of all the real and personal property and estate belonging to them, or either of them, for a similar purpose. It was declared in this assignment, that its execution or acceptance should not in any way impair the lien of the said David Leavitt upon any securities which he then held. On the 26th of July, 1845, in the absence of D. Leavitt from this state, a judgment was entered in the supreme court, in his favor against John W. & Rufus Leavitt, upon a bond and warrant of attorney, for fifty thousand dollars of debt; an execution was issued and returned, and on the 31st July, 1845, a creditor's bill was filed against them; subsequently, a receiver was appointed of their property and effects and they executed and delivered to him an assignment thereof On the 26th of January, 1848, the plaintiffs, who were judgment creditors of John W. Leavitt & Rufus Leavitt, filed their bill in this suit, against the latter, and a subpœna and injunction issued thereon, were served upon them. On the 10th of October, 1850, an amended bill was filed by said plaintiffs, to set aside said assignments, sale and judgment; David Leavitt was joined as a party defendant, and the subpœna therein was served upon him on the 11th day of the same month. This bill called for an answer from all the defendants, upon oath. The defendants answered the bill, and a replication was filed to each answer. For a fuller statement of the facts, see *Nicholson* v. *Leavitt*, (4 *Sand. S. C. Rep.* 276.)

The cause was heard upon pleadings and proofs before Mr Justice Roosevelt, and a decree made therein, which adjudged: (1.) That the assignments K and L were fraudulent and void as against the plaintiffs. (2.) That the other assignments were not fraudulent and void. (3.) That the hypothecation of the securities mentioned in schedules C and D, and the prior liens

of David Leavitt upon the securities embraced in the assignments K and L, were unimpaired by the acceptance of said assignments. (4.) That the creditor's bill filed by David Leavitt, and the proceedings thereunder, were not fraudulent as against the plaintiffs. (5.) That the plaintiffs were not entitled to any relief in this action against David Leavitt in respect of the household furniture in New Jersey. The plaintiffs appealed from the whole of said judgment.

C. O'Conor, for the appellants. I. The nine assignments annexed to the bill, and respectively marked A, B, C, D, E, F, G, K and L, contain the clause authorizing a sale of the assigned property on credit, and are therefore void as against the plaintiffs. (*Nicholson* v. *Leavitt*, 2 *Selden*, 510.) The court below set aside K and L, but refused to set aside the others.

II. The real estate assigned by the seven assignments, A to G inclusive, was copartnership property. It was taken in payment of partnership debts, was received for goods sold by the partnership, or was bought with partnership funds. This is proven by, 1st. The deposition of R. Leavitt. 2d. The deposition of J. W. Leavitt. 3d. The assignments themselves. In equity it is to be treated as personal property and administered as such. (*Collyer on Partnership*, § 135 *and note* 3. *Story on Part. pp.* 127, 128. 3 *Kent*, 38, 39. *Delmonico* v. *Guillaume*, 2 *Sand. Ch. R.* 366. *Bogert* v. *Hertell*, 4 *Hill*, 492. *Stagg* v. *Jackson*, 1 *Comstock*, 206. *Craig* v. *Leslie*, 3 *Wheat.* 577.) It has all the qualities of personality belonging to a partnership. No partner can be said to own any undivided portion of it; his interest must depend on the result of the final account. No individual creditor can claim payment out of the real estate, or any part of it, until the partnership creditors are paid, and then only out of such share as, on the accounting, shall be found to be the interest of his debtor. These assignments cannot be subject to a different rule from that which governs assignments of other partnership property. They are as much to be governed by the law of this state as the general assignment L, which covers all the *real* and personal property

of the assignors wherever situated, and which, by the decree, is set aside. No decided case sanctions the distinction made by the decree in favor of these assignments.

III. The assignment A was distinguished from K and L, and was declared valid as against creditors although equally with those assignments within the letter and the spirit of the decision in *Nicholson* v. *Leavitt*. The ground assumed was, that Frederick T. Mygatt was one of the assignors. An examination of the assignment will show that the property assigned is not only of the joint property, but the property of *each and any* of the assignors, and of course includes *the property, and the interest in property, of J. W. & R. Leavitt.* Upon no principle, can a creditor be deprived of his recourse upon the property of his debtor, because that debtor sees fit to join a third person in his void assignment. The plaintiffs seek to charge the property and the interest in property of J. W. & R. Leavitt, and so far as the assignment A assigns such property and interest in property, it should be set aside. As appears by the assignment itself, Mygatt had no real interest in the property assigned. It is made solely to pay the creditors of J. W. & R. Leavitt, and the surplus is to be reserved to them alone.

IV. Three of the assignments not mentioned in the first point (those marked H, I and J,) contain a clause equally objectionable with the credit clause, i. e. that which directs the assignees, after paying the preferred debts, to distribute the funds *realized* from the assigned estate among the general creditors, "*at such reasonable time or times as they in their discretion might think proper.*" These assignments should have been set aside. (1.) The assignees are directed "to collect and get in" *all the assigned estate*, in the first instance. And out of the moneys "so collected, received and gotten in," to pay, *without qualification*, the expenses of the trust and the preferred debts, most of the latter being those due to the assignee David Leavitt, or for which he was liable. Then follows the trust for the general creditors, under which they were to be paid at a time to be selected in the *discretion of the assignees*, although the money to be distributed was *already* in hand.

(2.) The principle upon which *Nicholson* v. *Leavitt* was decided was, that although a debtor might make an assignment devolving the duty upon his assignee of distributing his property among his creditors, he should not, without the assent of the creditors, avoid his obligation of immediate payment, nor extend the period of credit. In other words, that the debtor should not clothe his assignee with a power to say when the creditors should receive their dividends. (*Opinion of Gardiner, J.*) (3.) By these assignments the assignees are expressly authorized to pay the general creditors "at such reasonable times as they *in their discretion* may think proper." The distribution being directed to be made after all the funds were collected, it should then be immediate. (4.) This discretionary power to defer payment is vested in the assignees only as against the general creditors. David Leavitt, and the other preferred creditors, take their money at once. (5.) No clause could be more effectual in the hands of a subservient assignee, to coerce the creditors to a compromise. Vesting such a power could only have been suggested by a desire to *subject* the interests of the general creditors to the arbitrary will of the assignor by whom the assignees were chosen. (6.) If a debtor in failing circumstances shall be permitted to select his own favorite instrument for assignee, and clothe him with so formidable a power of coercion, the spirit and principle of the statute, and many solemn judgments under it, will be departed from. (*Grover* v. *Wakeman*, 11 *Wend.* 187.)

V. The sale of the personal property at Weehawken was fraudulent. (1.) The consideration was a credit in account. (2.) The delivery was a sham, though made with great formality. The buyer was not present, and evidently neither took nor felt any interest in the transaction. (3.) The seller continued in uninterrupted possession of the whole property for two years, and a part of it (down, at least, to the time of his examination, in July, 1849,) four years after the sale. The sale was fraudulent by the statute and at the common law. The former is only declaratory of the latter. (2 *R. S.* 136. § 5. *Sturtevant* v. *Ballard*, 9 *John.* 337. *Divver* v. *McLaughlin*,

2 *Wend.* 596. 2 *Kent*, 526–8. *Towner* v. *Church*, 2 *Johns. Ch. Rep.* 299.)

VI. The $50,000 confessed judgment, and also the execution and bill thereon, were merely auxiliary to the assignments Their only office, end or aim, was to effectuate the assignments. (*Mackie* v. *Cairns*, 5 *Cowen*, 547. 1 *Louisiana Rep.* 430. 2 *id.* 352.) The assignments being fraudulent, the judgment and the bill must fall with them. (1.) The principal assignment, which was of all the residue of the property of J. W. & R. Leavitt, or of either of them, was made July 31st, 1845. (2.) The amicable judgment was confessed July 26, 1845; the execution thereon was issued and returned *by consent* on the 28th; and the bill prepared on the 30th, before the assignment, and with a view to it. (3.) Immediately after the assignment of the 31st of July, and on the same day, the bill was filed, the subpœna and injunction served. (4.) The judgment and the creditor's bill could be of no avail except in the event of the assignments failing, for the assignments transferred every thing. (5.) Precisely that state of things existed that induced the court to declare a confession fraudulent, in *Mackie* v. *Cairns*, (5 *Cowen*, 547.) (*See per Colden, senator*, 570 *to* 575. *S. C. Hopk.* 373.) If this device of the judgment and subsequent proceedings can avail, it is the most simple thing in the world to escape the penalty of a fraudulent assignment. The assignee claims under the assignment so long as it is not attacked, and then, and not till then, falls back upon his judgment. (4 *Sand. S. C. R.* 260, 1. 4 *East*, 554.)

VII. There should be a decree declaring the several assignments A, B, C, D, E, F, G, H, I, J, K and L void, and directing an account of all the proceedings of David Leavitt as assignee, in connection with Vandervoort, or alone, from the beginning. (1.) The court cannot determine what final decree it would be proper to make until an account shall have been taken. (2.) If the decree should go further, it must necessarily be in various alternatives, according to the results of the account. (3.) It may be that the account will show such a state of the

assets as to obviate the necessity of deciding many difficult questions.

VIII. If the court should think fit, at this time, to consider the liabilities of the assignee, then we insist that the decree should charge the assignee with liability to the creditors for all the estate received by him, allowing credit to him only for such sums as he may have paid out, under the assignments, to other creditors, before the plaintiffs acquired a lien by filing their original bill. (1.) There is no reason in principle why the assignee should be permitted to retain, for his own demand. He can claim nothing upon the principle of set-off. He can claim under the assignment, and under that alone. If the creditors do not avoid it, he pays himself according to the trust. If they avoid it, the assignment is still good as against him, and as against the judgment debtor, and as *between* them. It is only toward the judgment creditor that it is a nullity. It is only under and through the assignment that the assignee could possibly make a title at law or in equity. (*Henriques* v. *Hone*, 2 *Ed. Ch. R.* 120. *S. C.* 13 *Wend.* 240.) (2.) As respects his own debt, he can claim nothing upon the allegation that he has in good faith *parted with* the proceeds of the assigned property to creditors. Such allegation is not true in fact. (3.) Where the money has once been paid over, the hardship of a second payment recommends the case to a favorable consideration. But the assignee, as to his own debt, can plead no such hardship. He is simply in the condition of other creditors at large. He cannot be said to have parted with the money, when at most he took it from one pocket and put it in another, or made an entry upon his books. If he be entitled at all, he would be entitled without any such act. (4.) Nor, as between the assignee of a debtor and the pursuing creditor, is there any question of hardship to be considered. The question is, which one of two parties *must lose?* The law will favor him whose conduct is unexceptionable, rather than him who, at best, can only claim that his trespass against the law is not of a kind peculiarly marked with moral blemishes. (5.) He need not accept the assignment unless he chooses The assignee leans upon the

assignment. The law adjudges that assignment a fraud—that it necessarily hinders and delays creditors. The assignee is a party to the fraud. Can the court, in the same breath, brand the fraudulent act, and say to one of the principals, take and keep the avails of your fraud? In *Masters* v. *Miller*, Lord *Kenyon* says: "No man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected." (4 *Term Rep.* 320, 329.) Nor, in such a case, can the court distinguish between fraud in fact and fraud in law. (6.) Fraud in fact would be made out, if a design to delay creditors were proved, outside of the written instrument. Fraud in law is where the parties see fit to avow their fraudulent design upon the face of the assignment. In either case the assignment is good between the parties, but void as to creditors. The same result must follow the setting aside the assignment in one case as in the other. (*See Riggs* v. *Murray*, 2 *John. Ch. Rep.* 565, 582; *Ames* v. *Blunt*, 5 *Paige*, 13, 19, 20, 21.)

IX. In the case last cited (5 *Paige*, 13) the chancellor thought, by reason of the great delay, (near five years, from January, 1823, to October, 1827,) that all the acts of the assignees ought to be affirmed, even the payments to themselves. But in our case this ingredient of delay is wanting. J. W. & R. Leavitt made their last assignment July, 1845. Judgment was recovered July 14, 1847. The bill was filed January, 1848. Here was no unusual delay, considering the magnitude of the estate, and that it was scattered over the United States, and would require a long time to collect it together. Besides, the assignments were impeached in the Nicholson and in other suits, as early as March, 1847. This was notice, at the least, to the assignee, and if, after that time, he proceeded with the distribution of the estate, he did it at his peril.

X. In no event can the assignee claim a credit for payments made after the filing of the original bill. (1.) The plaintiffs, by the commencement of their suit, acquired an equitable lien on all the property of J. W. & R. Leavitt which could not be reached by execution. (*The Albany City Bank* v. *Schermer-*

horn, 1 *Clarke*, 297. *Storm* v. *Waddell, and De Kay* v. *Same*, 2 *Sand. Ch. R.* 494, 514, *&c.* *Boynton* v. *Rawson*, 1 *Clarke*, 584. *Edmeston* v. *Lyde*, 1 *Paige*, 637. *Beck* v. *Burdett*, 1 *id.* 305.) (2.) To make the lien perfect as to the assigned property, it was not necessary, in the first instance, to join the assignee as defendant. The lien was created by the filing the original bill and serving the subpœna. It could be enforced against the assignee, either by an amendment to bring him in as defendant, or by a suit in the name of the receiver. In either event, the lien, as against the assignee, would date as of the day of the commencement of the original suit (*See Green* v. *Bostwick*, 1 *Sand. Ch. Rep.* 185; *Parker* v. *Browning*, 8 *Paige*, 391.) (3.) Lis pendens was notice to the assignee and to all the world. (*Murray* v. *Ballou*, 1 *John. Ch. R.* 577 *to* 580. *Edgel* v. *Haywood*, 3 *Atk.* 352, 357.) (4.) The counsel for David Leavitt appeared as the solicitors of J. W. & R. Leavitt in these suits. (5.) This, and the suits of Nicholson, and many others which were pending, authorize the conclusion that the assignee was apprised of all the proceedings of the creditors. (6.) The assignee cannot claim that any payments made by him since the original bill, were made innocently, and that he should be protected.

XI. The decree of the special term should be reversed, and a new decree made, in conformity with the principles above stated.

G. N. Titus, for the respondents. I. The right of David Leavitt to hold the debts, claims and property mentioned in schedules C and D, annexed to his answer, as security for the payment of the moneys owing to him by the firm of J. W. & R. Leavitt, is not denied by the plaintiffs. The amount of their indebtedness to him exceeded the amount of these securities.

II. All the assignments referred to in the bill were adjudged valid in the case of *Nicholson* v. *Leavitt*, (4 *Sandf. S. C. R.* 276.) The court of appeals decided that the provision, in several of these assignments, *authorizing a credit, in the discretion of the trustees, upon the sale of the property, avoided the trust as to*

a judgment creditor. (2 *Selden*, 510.) Upon no other grounds was either of said assignments adjudged invalid, and the judgment of the superior court remains undisturbed, except in that particular.

III. Each of the assignments in question was made to secure the payment to David Leavitt of moneys by him advanced to or paid for account of the firm of J. W. & R. Leavitt, and all fraudulent intent is denied. (1.) The original indebtedness of the firm to him remained after the delivery and acceptance of the two bonds and mortgages executed by John W. Leavitt for a part of that indebtedness. (*Day* v. *Leal*, 14 *John.* 404. *Ex parte Clowes*, (2 *Bro. C. R.* 595. *David* v. *Ellice*, 5 *B. & C.* 196.) (2.) If the partnership debt was extinguished at law, *pro tanto*, the firm was liable in equity until both bonds were paid. (3.) The mortgaged premises at Hoboken, and the Barclay street property, were each ample security for the payment of the bonds of J. W. Leavitt for $4000 and $20,000. (4.) The alleged preference given to David Leavitt by the firm of J. W. & R. Leavitt, in respect to the supposed individual indebtedness of the members thereof, would constitute no fraud against their creditors. The right of joint creditors to have the partnership property first applied to the discharge of the partnership debts, can be worked out only through the medium of the partners. No such right exists as against an assignment of partnership property executed by all the members of the firm. (*Nicholson* v. *Leavitt*, 4 *Sand.* 298. *Ex parte Ruffin*, 6 *Ves.* 126. *Ex parte Williams*, 11 *id.* 7. *Ex parte Kendall*, 17 *id.* 526. 2 *Story's Eq.* § 1253. 1 *id.* § 675. *Kirby* v. *Schoonmaker*, 3 *Barb. Ch.* 46.)

IV. The execution of each of these assignments of personal property was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property thereby transferred. The employment of J. W. Leavitt by the assignees, to act as their agent, was proper and for the best interest of the creditors. (*Nicholson* v. *Leavitt*, 4 *Sand. S. C. Rep.* 272. *Hennessy* v. *Western Bank*, 6 *Watts & S.* 300. *Cunningham* v. *Freeborn*, 11 *Wend.* 240.) These assignments were not made upon any agreement or assurance that either of

the assignors should have any agency in the management of the trust estates. John W. Leavitt received from said assignees only a fair compensation for his services as their agent, prior to July, 1847. His agency ceased before the commencement of this action.

V. The plaintiffs are entitled to no relief as against the assignments B, C, D, E, F and G. The property embraced therein consisted entirely of lands in different states, all lying out of the state of New York. (1.) The validity of these assignments must be determined by the *lex loci rei sitæ*. (*Chapman* v. *Robertson*, 6 *Paige*, 627. *Hawley* v. *James*, 7 *id.* 219. *Nicholson* v. *Leavitt*, 4 *Sandf. S. C. R.* 276. *Waterhouse* v. *Stansfield*, 12 *Eng. Law and Eq. Rep.* 206. *Story on Confl. of L.* §§ 365, 428, 436. *Smith* v. *Jackson*, 2 *Edw. Ch.* 28.) This is an international rule in regard to the conveyance of lands which cannot be varied by any general law of partnership existing in this state. (*Platt* v. *Oliver*, 3 *McLean*, 27. *Hosford* v. *Nichols*, 1 *Paige*, 226. *Yeatman* v. *Woods*, 1 *Yerger*, 20.) Their validity cannot be determined by the *lex domicilii* of the assignors, although the lands were acquired with partnership funds. (*Binney's case*, 2 *Bland's Ch. R.* 146. *Bell* v. *Phyn*, 7 *Ves.* 453. *Balmain* v. *Shore*, 9 *id.* 501.) (2.) In the United States land, purchased with partnership funds for the use of the partnership, is considered personal property, *so far only* as to subject it to the payment of partnership debts. In all other respects it is considered as realty. (*Coll. on Part.* § 135. *Buchan* v. *Sumner*, 2 *Barb. Ch.* 206. *Buckley* v. *Buckley*, 11 *Barb.* 44, 65. *Platt* v. *Oliver*, *supra*. *McAlister* v. *Montgomery*, 3 *Hayw. R.* 94. *Edgar* v. *Donnally*, 2 *Munf.* 387. *Andrew's Heirs* v. *Brown, adm'r*, 21 *Alab. R.* 442. *Hunt* v. *Benson*, 2 *Humph.* 461. *Matlock* v. *Matlock*, 5 *Ind. R.* 404. *Woodbridge* v. *Wilkins*, 3 *How. Mis. R.* 360. *Smith* v. *Jackson*, *supra*. *Dyer* v. *Clark's Adm'r*, 5 *Metc.* 576. *Stor. Eq.* § 512. *Story on Confl. of Laws*, § 523.) (3.) The validity of these assignments must be determined by the local law, whether the lands are considered as real or personal property. (2 *Bland's Ch. R.* 146.) They have violated no rule of equity, as the pro-

ceeds of the lands are to be applied to the payment of the partnership debts of the assignors. The trust to sell for cash or upon credit, as the assignees should think reasonable and proper, is not in violation of the *lex loci.* (*Ashurst* v. *Martin*, 7 *Porter*, 566. *Abercrombie* v. *Bradford*, 16 *Alab. Rep.* (*N. S.*) 560. 17 *Barb.* 370, 1.) (4.) The provision authorizing a sale upon credit alone should be adjudged void if unauthorized by the local law, and the assignments in other respects should be adjudged valid, *ut res magis valeat quam pereat.* Such is the rule of the common law. (*Darling* v. *Rogers*, 22 *Wend.* 483.)

VI. The plaintiffs are entitled to no relief, as against the assignment A. (1.) The merchandise &c., embraced in this assignment, was at New Orleans, and the domicil of J. W. Leavitt, one of the assignors, was in New Jersey at the time of its execution. It is not in proof at what place it was executed, but it was made with reference to the laws of Louisiana, and the question whether, as to its form or provisions, it was sufficient as against creditors to vest in these assignees the property thereby assigned, must be determined by the laws of that state, or of the state of New Jersey. (*Fanning* v. *Consequa*, 17 *John.* 518. *Lanfear* v. *Sumner*, 17 *Mass. R.* 110. *Oliver* v. *Townes*, 14 *Martin*, 102. *Price* v. *Morgan*, 7 *id.* 70. *Story on Confl. of Laws*, §§ 385–7, 390, 38. *Hutchinson* v. *Smith*, 7 *Paige*, 26.) There are exceptions to the rule that personal property has no locality, but must be transferred according to the *lex domicilii.* (*See Story on Confl. of Laws*, § 383, *note* 4.) (2.) The trust created by this assignment can be carried into execution by the assignee without an exercise of the power to sell on credit, and without violating any existing law. It is not in proof that the assignees have exercised that power in a single instance. This assignment of property in New Orleans should be adjudged valid, except as to the provision to sell on credit. (*Darling* v. *Rogers*, 22 *Wend.* 487. *Salmon* v. *Stuyvesant*, 16 *id.* 323. *Root* v. *Stuyvesant*, 18 *id.* 287. *Hone's Ex'rs* v. *Van Schaick*, 20 *id.* 569.) The decision of the court of appeals in *Nicholson* v. *Leavitt*, (2 *Seld.* 510,) has unsettled, but has not overthrown the doctrine of the cases above cited. (*Curtis* v. *Leavitt*, 17

Barb. 370. *Kellogg* v. *Slauson*, 1 *Kernan*, 302.) (3.) The plaintiffs, by this action, have acquired no lien upon the property embraced in the assignment, which was the *joint property of J. W. & R. Leavitt, and Frederick T. Mygatt.* The plaintiffs are not the creditors of Mygatt. He had the right to make an assignment of their *joint* property with the concurrence of the Leavitts; to the provisions of which the plaintiffs *as the creditors of J. W. & R Leavitt* cannot object. (*Story on Part.* § 101, *note* 3. *Cases under third point*, 4*th division.*) Mygatt is a necessary party to this action to avoid this assignment. Joseph C. Vandervoort is also a necessary party.

VII. The assignments H, I and J contain no provision authorizing the assignees to sell on credit, and should be adjudged valid as against the plaintiffs.

VIII. In any decree that may be made in this cause in regard to the validity of these assignments, the lien of D. Leavitt upon the securities and property acquired before, or held by him, at the time of their execution, and his right to their proceeds should be confirmed and established. His rights are expressly reserved in each assignment.

IX. All acts done in good faith before the commencement of this action, by the assignees or either of them, in the execution of the trust created by said assignments, should be allowed and confirmed; neither of them should be held accountable for any money paid by them, or either of them, to any preferred creditor, or applied towards the payment of any preferred debt, pursuant to the provisions of said assignment, before the commencement of this suit against him. (*Wakeman* v. *Grover*, 4 *Paige*, 24, 43. *Ames* v. *Blunt*, 5 *id.* 13, 19. *Barney* v. *Griffin*, 4 *Sand. Ch.* 552. *Strong* v. *Skinner*, 4 *Barb.* 561. *Andrews* v. *Ludlow*, 5 *Pick.* 32.) (1.) The assignees, by the acceptance of these assignments, became vested with the legal title to all the assigned property, and were bound to execute the trusts created thereby. (*Cunningham* v. *Freeborn*, 11 *Wend.* 240, 247. *Leitch* v. *Hollister*, 4 *Comst.* 211, 215. *Henriques* v. *Hone*, 2 *Edw. Ch.* 120.) (2.) These assignments are valid as between the assignors and assignees, and as to all the cred

itors who have not dissented; they are only *voidable* as to dissenting creditors. The delay of these plaintiffs in making D. Leavitt a party to their original suit, warranted the assignees in presuming their *assent* to these assignments, until their dissent was manifested by the service of the subpœna upon the assignee, in October, 1850. (*Amos* v. *Blunt*, 5 *Paige*, 13, 19.) (3.) No *suit was commenced* by these plaintiffs to set aside these assignments until the service of the subpœna under amended bill upon David Leavitt. (*Story's Eq. Pl.* § 904. *Fitch* v. *Smith*, 10 *Paige*, 9. *Griffith* v. *Griffith*, 1 *Hoff. Ch.* 158. *Hayden* v. *Bucklin*, 9 *Paige*, 512. *Steward* v. *Roe*, 2 *P. Wms.* 435. *Boynton* v. *Rawson*, 1 *Clarke's Ch.* 584. *Roberts* v. *Jackson*, 1 *Wend.* 478.) (4.) Allowance should be made to the assignee, in passing his accounts, for all moneys paid to judgment creditors, who had acquired a lien on the trust fund prior to the plaintiffs. (5.) This assignee should be allowed his costs in this action, out of the fund. (2 *Barb. Pr.* 328. *Grover* v. *Wakeman*, 11 *Wend.* 226.) He has acted in good faith, under the provisions of assignments which have been approved by repeated decisions. He is also entitled to the usual commissions, and to all reasonable expenses incurred in the administration of the trust. (*Riggs* v. *Murray*, 2 *John. Ch.* 565.)

X. The validity of the sale of the furniture and other personal property of J. W. Leavitt to David Leavitt, must be determined by the laws of the state of New Jersey, in which the defendant, John W. Leavitt, was domiciled at the time the sale was made. (*Story on Conf. of Laws*, § 383.) (1.) The possession of the vendor after sale of personal property in that state is not, *per se*, fraudulent as against creditors. (*Sherron* v. *Humphreys*, 2 *Green*, 217.) (2.) In New Jersey fraud cannot be *presumed*, but is a question for the jury, *and must be established* by proof. (*Mount* v. *Hendrickson*, 2 *South.* 738, 743. *Tillou* v. *Britton*, 4 *Halst.* 121, 136, 138.) (3.) David Leavitt cannot be made liable to account for the value of this furniture. It was not in his possession at the commencement of this suit. There is no evidence that he ever received the proceeds thereof. (*Nicholson* v. *Leavitt*, 4 *Sand. S. C. R.* 269.)

XI. In the entering of the judgment and the filing of the bill, on the 26th day of July, 1845, in the name of David Leavitt, against J. W. & R. Leavitt, referred to in the pleadings in this cause, there was no fraud intended or committed against the plaintiffs, or any person whosoever. All fraud in relation to these proceedings is fully denied in the answer. (1.) The reason and object of entering the judgment and filing the bill last referred to, are fully and satisfactorily explained in the answer, and are consistent with good faith and honesty of purpose towards creditors. (2.) The object of this judgment and bill was not to aid and give effect to an illegal assignment, but to secure the payment of an honest debt, independent of any of the assignments that had been previously made. (3.) The plaintiffs have not been hindered in the prosecution of their claim to this assigned property, in consequence of this creditor's bill. (4.) The defendant, David Leavitt, had an undoubted right to take this judgment, and file this creditor's bill, as a mode of collecting his debt, irrespective of the assignments; and to prosecute or suspend the prosecution of that suit, as he thought most conducive to his interests, without subjecting this proceeding to the imputation of fraud. (*McBroom* v. *Turner*, 1 *Stewart*, 72.)

XII. The judgment of the court at special term should be affirmed with costs.

Clerke, J. The rights relating to the acquisition, enjoyment and disposition of real property, are prescribed and regulated, exclusively by the laws of the country in which the property is situated. Every community, independent and sovereign, possesses this power, as an inherent and essential element of its sovereignty. No other community can interfere with the method by which real property may be acquired or lost, the tenure by which it may be held, the duration or quantity of interest in it, or the conditions to which the enjoyment of it is subject; but an instrument purporting to dispose of real property situated in another state or country, may nevertheless be within the reach of the laws of the state in which the instrument is executed, and may be assailed on the ground, for instance, that the instrument

was in fraud of its own citizens, or that it was obtained fraudulently from the grantor. It appears to me that this is as essential an element of sovereign power in the state, in which the fraud is perpetrated, as the power of which I have above spoken is essential to the sovereignty of the state or country in which the property is situated. No country can efficiently discharge its functions unless it can protect its citizens against fraud; and this it never could do, unless it can exercise its authority in repressing or redressing fraud, over every one within its jurisdiction, over every wrong committed within it, and over every means by which the commission of fraud is attempted. I therefore think, that although many of the assignments in question relate to real and personal property in other states, if our law deems them fraudulent, it is within the province of this court to declare them void. The assignments marked as schedules A, B, C, D, E, F, G, K and L, contain the clause allowing the assignee to sell on credit, and are clearly within the *principle* established in *Nicholson* v. *Leavitt*, (2 *Seld.* 510.) The ground that schedule A is distinguishable from the rest, because another joint owner of the property, not liable to the plaintiffs, united with R. & J. W. Leavitt in the conveyance, is not tenable. The property assigned is not merely of the joint interest, but that of each of the assignors. The assignments, marked as schedules H, I and J, do not contain the clause authorizing a sale upon credit; but, in my opinion, they each contain one equally obnoxious. They allow the assignee to withhold the division and distribution of the assets for any length of time, which he in his discretion may think proper. This, if carried out, gives him a coercive power over the creditors, arming him with the means of constraining them to a commutation or release of their claims. It is, in a great measure, to prevent and ignore such a design, that courts of justice have so generally, of late, evinced a disposition to avoid all instruments investing the assignee with any discretion beyond what is absolutely inseparable from the performance of his trust. A power to sell on credit invests him with a discretion to protract, indefinitely, the satisfaction of the claims of creditors, and the final reckoning and

settlement of the trust; the very thing which he is directly and expressly authorized to do by the clause to which I have referred in schedules H, I and J, which I perceive is also contained in A and L.

The decision in *Mackie* v. *Cairns*, (5 *Cow.* 547,) is analogous to this case, in relation to the judgment confessed by J. W & R. Leavitt to David Leavitt. In the language of Senator Colden. "if the judgment was an independent transaction between the parties it would be valid. Where a security is taken which is defective, questionable, or even fraudulent, a party may take a new security that may be free from objection. But, he must abandon the objectionable or fraudulent security. He cannot hold the good security, and yet avail himself of that which is vicious. Much less can he make the new security a means of sustaining that which was illegal." In the present case, the assignee holds fast tenaciously to the assignment and to the judgment; and, by the aid of both, endeavors to effectuate an intent manifested in the assignment, which the law, in my opin ion, declares fraudulent and void. The cases are parallel; and the judgment must abide the fate of the assignments.

With regard to the sale of the personal property at Weehawken, I think we have no jurisdiction over it. The sale was made, and the property was delivered in New Jersey. By the answer of Mr. David Leavitt, and according to the evidence of J. W. Leavitt, the bill of sale, with the inventory, was made out and delivered on the premises, with the property. The validity of the transaction, both as to the sale itself, and the extrinsic acts, simultaneous with or subsequent to it, must be determined by the laws of New Jersey.

I think there should be no direction to the referee at present, as to any amounts which he has applied in discharge of debts due to himself. It will be better to reserve that question until the coming in of the report; of course, the referee may ascertain the amounts so applied without crediting him at present for them in the account.

The decree of the special term should be reversed with costs,

and a new decree settled in conformity with the principles which I have indicated in this opinion.

DAVIES, J., concurred.

ROOSEVELT, J., dissented, in part.

Decree reversed.

[NEW YORK GENERAL TERM, September 8, 1856. *Roosevelt*, *Davies* and *Clerke*, Justices.]

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19a 299

ERBEN *vs.* LORILLARD.

Unless a jury has clearly and palpably decided against the weight of evidence, their verdict will not be set aside.

L. applied to the New York Gas Company to purchase a piece of land. The price asked by the president was $75,000, and he told L. that E. would take the land on lease at a rent of eight per cent on the cost. L. then called on E., who said he would take a lease for 21 years, at 8 per cent on the purchase price, but that he thought the price asked was too high, and that the property could be got for $60,000. L. then employed E. to negotiate the purchase at the latter sum, under a promise of a lease for 21 years at 8 per cent. E. negotiated with the company until they agreed to sell at $55,000, at which amount L. purchased, and took a conveyance. L. then refused to fulfill his agreement with E. and leased the property to other persons. In an action by E. to recover of L. for his services, the plaintiff, as evidence pertinent to show the value of his services, offered to prove the value of the promised lease. The evidence was admitted, under objection, but in summing up, the judge directed the jury to leave out of view all evidence given of the value of the lease. The jury having rendered a verdict in favor of the plaintiff for $2000; the court refused to set aside such verdict as being against the weight of evidence. ROOSEVELT, J., dissented.

APPEAL from an order made at a special term. In November, 1849, the defendant applied to the New York Gas Company to purchase some land at the corner of Canal and Center streets. The price asked by the president was $75,000, and he informed the defendant that the plaintiff, Erben, would

take the land on lease at a rent of 8 per cent on the amount of the purchase. Upon this the defendant called on the plaintiff, who said he would take a lease for 21 years at 8 per cent on the purchase, whatever the land could be got at, but that he thought the price asked was too high, and that the property could be got for $60,000. The defendant then employed the plaintiff to negotiate the purchase at the latter sum, under a promise of a lease for 21 years at 8 per cent on the purchase. The plaintiff thereupon, did negotiate with the company, and after much effort, succeeded in getting their price reduced to $60,000, when the defendant refused to purchase at that price, but offered to take it at $48,000 or $50,000. The plaintiff again renewed the negotiation, and the company ultimately agreed to sell at $55,000, at which amount the defendant purchased, in February, 1850, and took a conveyance. Having obtained the land, the defendant refused to fulfill his agreement with the plaintiff, and leased the property to other parties. This action was brought to recover for the services so rendered, and the defense was, 1st. A denial of the retainer or employment of the plaintiff, alleging that if he did interfere in the negotiation, it was his voluntary act. 2d. That the agreement, not being in writing, is void by the statute of frauds. As evidence pertinent to show the value of the services, the plaintiff offered to prove the value of the promised lease. The evidence was admitted, subject to the defendant's exception, but, in summing up, the presiding judge directed the jury to leave out of their view all evidence given of the value of the lease. To which ruling the plaintiff excepted. The jury rendered a verdict in favor of the plaintiff for $2000. His honor Judge MITCHELL, at a special term, ordered a new trial; and from that order the plaintiff appealed.

H. Smales, for the plaintiff. I. The jury have found that the plaintiff was not a volunteer, but that the services were performed on the retainer of the defendant, and their finding is conclusive. It was a question of fact, and plainly submitted to them.

II. Admitting the agreement to have been void by the statute of frauds, the plaintiff is entitled to recover for his services. (*Burlingame* v. *Burlingame*, 7 *Cowen*, 92. *King* v. *Brown*, 2 *Hill*, 485. *Sprague* v. *Blake*, 20 *Wend.* 61.)

III. The facts constituting the agreement were necessarily and properly in evidence, to rebut the allegation in the answer "that if the plaintiff did interfere in the negotiation for said property, it was his own voluntary act, and that said defendant never did employ him as his agent, or otherwise, in relation thereto."

IV. The measure of damages is the compensation agreed to by the parties themselves for the services, i. e. the lease, or its value. (*Sedgwick on Damages*, 192, 193. *Jack* v. *McKee*, 9 *Barr*, 235. *De Medina* v. *Polson*, 1 *Holt's R.* 47. *Doe* v. *Bell*, 5 *T. R.* 471. *Sprague* v. *Blake*, 20 *Wend.* 61. *Cases cited above.*)

V. The parties having themselves agreed that the compensation for the services should be "a lease," evidence of the pecuniary value of the lease is a proper and the only legal mode of determining the compensation for the services. The agreement was mutually binding on them, and it is not competent for either party to vary the terms, more especially for the defendant to do so, after the plaintiff's part of the agreement has been entirely performed.

VI. If the lease had proved worthless, a tender of it by the defendant would have been equivalent to performance on his part, and the plaintiff could not have refused the lease, and demanded a pecuniary compensation. The value of the plaintiff's services being then determined *against* him by the value of the lease, it follows that the same rule must hold good in his favor; *otherwise* the agreement would be binding on the plaintiff and not on the defendant; and the amount of compensation would depend upon whether the defendant chose to perform or repudiate the agreement.

VII. An agreement void by the statute of frauds, is competent evidence, where a right of action has arisen from its full or partial execution; and so far as the right of action is

recognized and can be enforced, the terms of the agreement are binding on the parties. *As to sales of land:* In *Burlingame* v. *Burlingame*, (*supra*,) the plaintiff agreed to work three years for a piece of land. Evidence of the value of the land was admitted. (*Opinion of Ch. Justice Nelson in King* v. *Brown.*) In *King* v. *Brown*, (*supra*,) such evidence was held improper, *because* the parties had themselves fixed the amount of compensation "$40, *to be paid in work.*" *As to leases: De Medina* v. *Polson*, (*supra*,) the agreement, though void, was held to fix the amount of rent, and evidence of value of the premises excluded. In *Doe* v. *Bell*, (*supra*,) a void agreement was held to regulate the amount of rent and the terms of the holding. *As to sales of goods:* Where goods are sold under a void contract, the contract price governs. (*Sprague* v. *Blake*, 20 *Wend.* 61.)

VIII. The contract having been entirely performed on the part of the plaintiff, is no longer within the operation of the statute; a specific performance could have been enforced, had not the defendant, by leasing the land, disabled himself from performance. For the reason that otherwise the statute would be made the means of enabling the refusing party to commit a fraud. (2 *Story's Eq. Jur.* 759, 674. *Lowry* v. *Tew*, 3 *Barb. Ch. R.* 407. *Rhodes* v. *Rhodes*, 3 *Sandf. Ch. R.* 279.)

IX. The grounds on which a plaintiff is entitled to recover in cases like the present, are, that the performance by one of the parties, takes the case out of the statute, and that by accepting the performance the party is estopped from pleading the statute.

C. W. Sandford, for the defendant. I. The court erred in permitting Mr. Fox to testify as to Erben's declarations to him about a lease. (1.) His declarations to Fox are not evidence in his own favor. (2.) Verbal agreements for a lease of land not admissible. (3.) No agreement for a lease is set forth in the complaint.

II. The court erred in permitting evidence of the value of such a lease as Erben claimed to be entitled to. (1.) It was

calculated to lead the jury from the real issue. (2.) It was giving the plaintiff the benefit of a supposed verbal contract for land, which was not binding, even if proved. (3.) It was trying an issue not contained in the pleadings.

III. The plaintiff should have been nonsuited, on the defendant's motion. (1.) No evidence of any employment of plaintiff as agent or broker had been given. (2.) If the evidence proved any thing, it proved that plaintiff busied himself in the expectation of obtaining a lease, and not for a commission. (3.) If the evidence proved a breach of an agreement for a lease, it could not go to the jury under the pleadings. (4.) There was no offer proved by the plaintiff to take a lease, and no refusal to give a lease by the defendant.

IV. The verdict was against evidence. It was clearly proved, that Erben abandoned all claim upon the premises. He made no claim for services, except for a lease, which he declined, at the rate the defendant supposed and understood he was willing to give.

CLERKE, J. This is a motion for a new trial, on the ground that the verdict was against the weight of evidence. All the questions were clearly and directly submitted to the jury by the judge, viz. as to the performance of the services, and as to the value of those services. Although the compensation which they have allowed was large, they were much more capable than we can be, of correctly ascertaining the value of the services rendered by the plaintiff to the defendant. It would be mere speculation, on our part, to suppose that they took the expected lease into consideration in measuring the compensation, particularly when the judge expressly told them that "they could not resort to the lease to determine the value of the services." There is certainly nothing in the case to induce us to say that the jury clearly and palpably decided against the weight of evidence. And under no other circumstances can I ever consent to set aside the verdict of a jury.

DAVIES, J., concurred.

ROOSEVELT, J., (dissenting.) The alleged contract, not in writing, to give a lease for a term of years, if made, was void by the statute of frauds. On this point there is no dispute. And yet the jury, in effect, have declared it valid and given damages for its breach. This they had no legal power to do; and their verdict consequently, being against law, should not be allowed to stand.

As to any claim on the ground of the supposed value of the plaintiff's services, independently of the alleged express agreement, it is a sufficient answer to it to say, in the language of one of the points made on his behalf, that the plaintiff is not a land broker, and was not employed to negotiate the purchase of the land in question for a pecuniary compensation.

There was no contract, as it seems to me from the whole evidence, verbal or written, made or intended to be made. There was not even an understanding. The utmost that can be said is that there was a misunderstanding. The plaintiff on his part bound himself to nothing, and it is equally clear that the defendant (whatever the plaintiff may have supposed) bound himself to nothing. There was a talk no doubt—perhaps several of them—there was precisely that kind of intercommunication from which disputes so often arise and against which (as matters of suit at law) the statute was intended to guard both the public and the parties.

The verdict is against law and evidence, and the order made at special term, setting it aside, and directing a new trial, should be affirmed.

Order appealed from reversed, and new trial denied.

[NEW YORK GENERAL TERM, September 8, 1856. *Roosevelt*, *Davies* and *Clerke*, Justices.

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18a 71

VALENTINE G. HALL *vs.* RUEA NELSON.

The owner of the equity of redemption is a necessary party to a suit for the foreclosure of a mortgage. And the objection that he is not made a party may be made by the mortgagor, in his answer.

The fact that the deed from the mortgagor to the present owner of the equity of redemption was not recorded, at the time of the commencement of the foreclosure suit, and of the filing of the notice of lis pendens, does not render the case an exception to the general rule.

So much of the code of procedure as confers upon county courts jurisdiction of suits for the foreclosure of mortgages, is unconstitutional and void. BROWN, P. J. dissented.

At the time of the adoption of the present constitution, actions to foreclose mortgages and sell the mortgaged premises formed an ordinary class of cases, in equity, and cannot be considered as "special," within the true meaning of that instrument, where it declares that county courts shall have no original civil jurisdiction except in such *special cases* as the legislature may provide.

APPEAL from a judgment of the Kings county court. The action was brought to foreclose a mortgage, executed by the defendant. The complaint set forth that on the 12th day of November, 1852, the defendant executed a bond and mortgage to the plaintiff for twenty-five thousand dollars, conditioned for the payment of that sum in two installments, viz: Two thousand five hundred dollars on the first day of March, 1853, and the remainder at the expiration of two years from the date of the bond and mortgage. That the mortgage covered twenty-four lots of ground in the city of Brooklyn. That the mortgage was duly recorded on the 18th day of November, 1852. That the defendant had failed to comply with the condition of the bond and mortgage, by omitting to pay the sum of twenty thousand five hundred dollars of principal on the 12th day of November, 1854. That no proceedings at law or otherwise had been taken to recover said sum, and that the defendant had or claimed an interest in the mortgaged premises, and prayed judgment of foreclosure and sale, and for any deficiency that might remain after applying all the money, applicable to the payment of said mortgage, thereto. The answer admitted the making of the bond and mortgage, but denied that the defendant had any interest in the mortgaged premises; and alleged that on the 21st

December, 1854, the defendant sold and conveyed the premises described in the complaint to George W. Nelson The cause was brought to trial before the Kings county court on the 19th of February, 1855. The counsel for the plaintiff proved the amount due on the bond and mortgage, and rested. The defendant's counsel read a conveyance of the premises mentioned in the pleadings, from the defendant to George W. Nelson, dated December 21, 1854. This was a warranty deed, and conveyed the premises to the grantee, subject to the payment of the mortgage. The court held that the proof on the part of the defendant was insufficient to sustain the answer, and ordered judgment of foreclosure and sale and for the deficiency, on the ground of its appearing that the conveyance to George W. Nelson was not recorded at the time of the commencement of the action; the notice of lis pendens having been filed on the 5th of January, 1855, and the deed recorded on the 9th of February following.

From this judgment the defendant appealed to this court.

Starr & Ruggles, for the appellant. I. It appears, as matter of fact, that the defendant sold and conveyed all his interest in the mortgaged premises, prior to the commencement of this action, and that the owner of the equity of redemption is not a party defendant. The title passed by the delivery of the deed; and the presumption is, that the deed to George W. Nelson was delivered on the day of its date and acknowledgment. (*Jackson* v. *Bard*, 4 *John.* 230. *Seymour* v. *Van Slyck*, 8 *Wend.* 414. *Wyckoff* v. *Remsen*, 11 *Paige*, 564.)

II. The owner of the equity of redemption is a necessary party to a foreclosure suit. (*Reed* v. *Marble*, 10 *Paige*, 413 414. *Wakeman* v. *Hazleton*, 3 *Barb. Ch.* 150.) The objection is properly taken by answer. The defense is available for the mortgagor, as he may be liable for a deficiency, and is entitled to object to any irregularity in the proceedings. (*Reed* v. *Marble, cited above.*) It is no answer to this defense, that the conveyance to George W. Nelson was not recorded at the time of the filing of the notice of lis pendens. (*Wakeman* v

Hazleton, *cited above*. *Stuyvesant* v. *Hall*, 2 *Barb. Ch.* 160 2 *R. S. 4th ed.* 162, § 1. *Code*, § 132.)

III. The judgment of the county court is void for want of jurisdiction. The statute conferring jurisdiction, (*Code*, § 30,) upon county courts in actions for the foreclosure of mortgages, is unconstitutional. (*Const. of N. Y. art.* 6, § 14. *Kundolf* v. *Thalheimer*, 2 *Kernan*, 597.) This objection may be taken at any time. Whenever it appears that there was a want of jurisdiction, the judgment will be void. (*Bloom* v. *Burdick*, 1 *Hill*, 139. *Dudley* v. *Mayhew*, 3 *Comst.* 9. *Kundolf* v. *Thalheimer*, *cited above.*)

IV. The judgment of the county court should, therefore, be reversed.

Barnard & Parsons, for the plaintiff.

EMOTT, J. There is no doubt that the owner of the equity of redemption is a necessary party to a suit for the foreclosure of a mortgage. The mere statement of this proposition is sufficient to show its correctness, without the citation of any authorities in its support. The action is brought for the express purpose of foreclosing the equitable estate and right to redeem remaining against the mortgage, and of transferring to the mortgagee, or under our practice, to the purchaser at a sale by virtue of the decree, a complete legal title to the mortgaged premises. The very object of the proceeding would, therefore, be completely defeated if the owner of the equity of redemption were not a party. No title could be made that would not be defeasible by the person in whom this equity of redeeming the mortgage remained, not barred or destroyed. I do not understand that this proposition is disputed as a general rule by the counsel for the respondent, but it is sought to be met in its application to this case by the answer; first, that the mortgagor after he has parted with this equitable estate, cannot make the objection, that his grantee is not a party to the suit; and secondly, that the fact that the deed from the mortgagor to the present owner of the equity of redemption was not recorded at

the time of the commencement of this suit, and of the filing of the notice of lis pendens, makes an exception to the general rule.

The first answer is manifestly insufficient. The want of any necessary party—of any party without whom the matters in litigation cannot be finally determined or a perfect judgment be rendered—is an objection which is expressly given to any party, by the code; by demurrer where the facts constituting the objection appear in the complaint, or by answer where they do not. And this objection comes with entire propriety from the mortgagor in a foreclosure suit, because his ultimate liability for the debt makes it of the highest importance to him that the title which will be made by the sale should be perfect against all equities, and especially against that which is of the greatest consequence—the entire equity of redemption.

There is no question left as to this point but the main question, whether the owner of the equity of redemption by a deed unregistered at the commencement of the suit and at the filing of the notice of lis pendens is a necessary party. The fact of the conveyance by the defendant Ruea Nelson, to one George W. Nelson, previous to the commencement of this action, was proved, on the trial, and that his deed had been subsequently recorded. No possession was shown to have been taken of the lands by the grantee in this deed, and thus the question turns upon the effect of the commencement of this foreclosure and the filing of the lis pendens upon the owner of the equity of redemption by an unrecorded deed, and the effect of the recording of the deed upon the title of a purchaser at a sale by virtue of a judgment in this action.

The effect of filing a notice of the pendency of a suit of any description, affecting lands, is sufficiently plain from the code, (§ 132.) It is declared to be constructive notice of the action from the time of its filing, to purchasers and incumbrancers. The same was its office under the former practice. (2 *R. S.* 174, § 48, [43].) The words purchasers and incumbrancers, in these statutes, evidently mean purchasers subsequent to the notice. The operation of the proceeding is wholly prospective; there is nothing in the act or elsewhere, declaring unrecorded

conveyances void against, or in respect of, suits commenced or notices of the pendency of actions, filed subsequent to such deeds; or subjecting the owners of lands whose title is not upon record to the consequences of a suit to which their grantors might be parties but who were not, merely from the plaintiff giving notice in the manner required by statute that he had commenced such a suit. Nor is there any thing in the effect or operation of such a notice which assimilates it to a conveyance or brings it within the definition of that term, given by the recording act. The filing of this notice is merely a statute substitute for actual notice to subsequent purchasers and incumbrancers of the existence of the plaintiff's claim, and that he has commenced an action to enforce it upon these lands. Whoever buys after that, buys with notice equivalent to actual knowledge of these facts.

Nor does the registry act afford any better answer to this objection. Its whole object, as was stated by Chancellor Walworth in *Stuyvesant* v. *Hall*, (2 *Barb. Ch. R.* 158.) is to protect subsequent grantees and mortgagees against previous mortgages, deeds, &c. which are not recorded, and to deprive the holder of a prior unregistered conveyance of the right which his priority in time would have given him at the common law. The recording of a deed or mortgage is therefore constructive notice only to those who have subsequently acquired some right or interest in the property, under the mortgagor or grantor. And in this case of *Stuyvesant* v. *Hall*, the chancellor held that the recording of a subsequent mortgage of a part of the premises included in a prior mortgage, and the filing of a notice of the commencement of a suit to foreclose this junior incumbrance, were not constructive notice to the holder of the junior mortgage so as to establish any rights or equities against him. It is not the intention of the recording acts, or the effect of recording any conveyances under their provisions, to create or destroy any rights with respect to prior recorded deeds or mortgages. An unregistered deed is not declared void as to a foreclosure of a mortgage commenced after its delivery, but only as to subsequent purchasers of the property in good faith. It is only be

tween parties holding deeds or mortgages of the premises that such questions under the registry acts can arise. As soon as these premises should have been sold, and a conveyance made to the purchaser, that purchaser could claim the protection of the statute against any deed not then recorded, and of which he had no notice. But if he should find, as he would in this case, a deed of the equity of redemption on record, made before this suit was brought, and the grantee in which was not a party here, he would find an equity of redemption which this judgment did not foreclose, and a deed which his subsequent conveyance did not affect or in any way override.

It is perfectly clear that the objection raised by this answer and proved on the trial in the court below, was sufficient to prevent any further proceeding in the action, until this difficulty was obviated.

If there were no further question in the case, the judgment should be reversed and the proceedings remitted to the county court for a new trial, costs to abide the event. But another question is raised here and in other cases argued at this term, and that is the constitutionality of the act conferring jurisdiction of suits for the foreclosure of mortgages on county courts.

If this were a new question I should have no difficulty in holding that the words "special cases," in section 16 of the article of the constitution relating to the judiciary, must mean cases which the legislature should specify. The extent of the selection and specification thus to be made might very properly be left to the legislature; and the county court according to such an exposition of the consitution might be moulded into such a form as the public exigencies should require. Undoubtedly the legislature, in the passage of the judiciary act and of the code of procedure, acted upon such a construction of the constitution a construction which would vest a large discretion in them in giving jurisdiction to this tribunal. The community have acquiesced in this construction, and under these statutes litigations and judgments have taken place and titles have been acquired by the intervention of the county courts, and they were filling a large and increasing sphere of usefulness in our judicial sys-

tem. These are considerations which courts ought not lightly to disregard in passing upon the construction of a constitutional provision so obscure and so doubtful in its meaning as that under consideration. Such a provision should be expounded, I think, with some regard for, and if possible in accordance with, the deliberate sense and action of the legislature, and in such manner as to promote the public interests and the great and obvious ends of the instrument and the article of which it is a part. I make these observations because I foresee the serious consequences of holding this statute to be unconstitutional, and I feel the force of the argument they suggest in so doubtful a case. But these are considerations to which our ears can no longer be open, and for the consequences of a decision adverse to the jurisdiction of the county court in these cases, this court will be in no degree responsible. The question is no longer an open one for us. In the case of *Kundolf* v. *Thalheimer*, (2 *Kern.* 593,) the court of appeals have settled the construction of the constitutional provision, by which the jurisdiction of the county court is defined, and adjudicated the principle by which that article must be expounded. We are not, therefore, to construe this part of the constitution as we understand it, but as it is understood and expounded by the court of last resort.

There were two methods of interpreting the words, "special cases," which is the limiting phrase used in the constitution in reference to the jurisdiction which may be conferred on the county courts, limiting their original civil jurisdiction and their "jurisdiction in equity cases." One method is that which I have already indicated, and which would consider the word special as used with reference to the future action of the legislature, perhaps as rather directory than otherwise, making it necessary for the legislature to select and specify particular if not peculiar cases which this court might entertain, but allowing every action to be or become a special case within this jurisdiction which the legislature saw fit to legislate into that category. The other construction would refer the meaning of the word special altogether to the past action of the same legislative department of the government, and restrict it not to what the legislature might

thereafter see fit to make, but to what they had already made, "special cases." In other words, according to this view the special cases which the county court might entertain were such as were already, at the adoption of the constitution, known in the legislation of the state as distinct from the ordinary suits and actions possessing characteristics by legislation, which were extraordinary and peculiar and authorized by law, to serve a particular purpose. This latter view is that which is taken by the court of appeals; and there is no authority under the constitution as they have interpreted it, to confer jurisdiction upon the county court, except in those particular cases which were to be found in the statute book, when the constitution was adopted possessing all these characteristics, and thus clearly distinguishable from all ordinary suits and actions. For examples of such cases the court refer to summary proceedings to recover land, proceedings to drain swamps and proceedings in insolvency—examples which indicate clearly the scope which the court intended should be given to the provision in question. It is true the decision reported in 2 *Kernan* was made in reference to one of a class of actions which were formerly known as actions at law; but the jurisdiction of the courts was as well established, and their proceedings as well settled, in suits in equity as in the ordinary common law actions of assumpsit, case, covenant and the rest. And therefore it is as easy to determine what were special proceedings in equity as at law, according to the statutes and the jurisdiction and practice of the courts in 1846.

We were pressed at the hearing with the argument that the term special cases was recognized and applied as the description of all causes or actions, as well as proceedings, which had been subjected to special regulations or enactments as to the mode of procedure. That is, that whenever the legislature had previous to 1846 taken a common law action, or any kind of suit in equity, belonging to the ordinary jurisdiction of the courts and had made special regulations as to the mode of proceeding or the manner of enforcing the remedy in any such case, this made any kind of action or proceeding which had thus been legislated upon, a special case. I do not know that there is any legislation

to be found upon the statute books, that would bring suits for the foreclosure of mortgages within even this test. Mortgages, their redemption and their foreclosure, are among the earliest and the best known subjects of equity jurisdiction, wherever such a jurisdiction is recognized. The maxims by which this branch of equity law is administered, and even the proceedings and the remedies which the law affords in such cases, are in a great degree borrowed from the civil law. From thence we derive the method of terminating the mortgagor's right of redemption by a sale, which, although rejected by the equity courts of our mother country, for a strict foreclosure, has always been the practice of our tribunals. There is little or nothing in the regulations of the statutes in reference to mortgage cases, which is not declaratory of principles of equity and rules of practice which had been previously declared and adopted by the courts as part of the equity jurisprudence of the state. But this cannot be the true test of the class of cases we are seeking. Cases that were special at this period were either actions that were wholly the creatures of statutes for special and recognized purposes, and not in their nature within the ordinary jurisdiction of the courts, or they were remedies given by statute which were entirely new and unlike the ordinary and usual course of proceedings of the courts in any other cases. The doctrine of the case of *Kundolf* v. *Thalheimer*, is that we are to construe the phraseology of the constitution by the state of facts existing when it was adopted; that we are to see what actions and proceedings would have been known and described as special cases under the statutes in 1846. It will hardly do to say that the term would then have been admitted to be applicable to all cases and actions in regard to which the legislature had made any special provisions; or to all the matters which are regulated by the provisions of the 8th chapter of the 3d part, or in other portions of the revised statutes. For instance the legislature, in 1830, saw fit to change entirely the character and the procedure in the action of ejectment, to abolish the common law fictions of lease, entry and ouster, and to substitute a statutory action of ejectment, formerly a mere possessory suit, for writs

of right and all the old real actions. Did that make the action of ejectment a special case according to the construction we are following? Clearly not, because the proceedings in the action of ejectment were still left to follow the course of the common law and the existing practice of the courts, in all its essential features. There was still a declaration and a plea, a trial, a verdict, judgment and execution, as in other actions. The action could still be brought in all cases where it lay under the old practice, and in certain additional cases in lieu of a writ of right and a writ of dower. The action still continued a common law action, and its course was that of ordinary suits at law, in all its main and essential characteristics. So too the action of replevin was by the same statutes extended in its scope, and altered in its procedure; but hardly any lawyer, I think, would in 1830 or in 1846 have called the action of replevin a special proceeding or a special case, in the sense in which the court of appeals intend the use of the term.

This mode of construing the constitution probably leaves us but little right to inquire or to conjecture what the meaning and intention of its framers was in this or any other part of it, except as it may be gathered from the most narrow and literal construction of terms. But we may be allowed to say what it seems quite obvious that the makers of that instrument did not intend to do. And it can hardly be doubted that they did not contemplate or design any such unreasonable distinction or absurd result as would follow from attaching the term special cases to all actions and proceedings in regard to which special provisions were then to be found in the statutes, and excluding all others. It is hardly to be supposed that the authors of the constitution intended to allow the legislature to confer upon these local and limited courts jurisdiction of ejectment and replevin, of proceedings to dissolve corporations and suits against them, of actions against legatees and next of kin, and against all public bodies and on all official bonds; in short of the most difficult and the most complicated actions known to the common law or to courts of equity, and which had for that reason been simplified as far as possible and specially regulated by statute, and

still to refuse the power to confer jurisdiction to try an action of assault and battery or a suit on a promissory note.

It is true that there are certain remedies and proceedings given and defined by these statutes, especially in the equitable jurisdiction of the courts, which would seem to come within a very narrow definition of the term special cases in the view which has been taken of it by the court of last resort, and yet which are among the most complicated and difficult, though by no means the most infrequent, proceedings in our courts. Such are the proceedings against heirs and devisees for the debts of the ancestor, which are in their present form a new and a peculiar remedy given by the statute exclusive of any other or former modes of procedure. Such also are perhaps the proceedings in partition, by suit or by petition. These are instances of new and peculiar remedies given by the statutes, not proceeding or resulting in accordance with the ordinary rules and practice of the courts of common law or equity jurisdiction. Whether these, and others resembling them, are cases of which the constitution intended that the county court should be allowed to acquire jurisdiction; whether indeed any *action* whatever brought in the ordinary manner of the courts, either as a legal or equitable remedy, can be tried in the county court, are questions which must be decided as they arise: some of them will now be found to be questions of no little difficulty. It is enough for the present case to say that we can discover no reason or principle upon which an action for the foreclosure of a mortgage —an action as frequent in its recurrence and as uniform and consistent with known rules in its procedure in a court of equity, as an action of assumpsit or of trespass, for an assault and battery in a court of law—can be regarded as a "special case," under any rule or construction of the meaning of that term which excludes the last mentioned form of action at law from its scope.

We are constrained therefore by the authority of the court of last resort—and following their construction, to decide that so much of the code of procedure as confers jurisdiction of suits for the foreclosure of mortgages upon county courts is unconstitu-

tional and void, and therefore this judgment must be reversed in toto.

BROWN, P. J., concurred on the question of parties, with this opinion, but dissented on the question of jurisdiction.

S. B. STRONG, J. When the holder of a mortgage of real estate institutes proceedings in equity to foreclose it, he is bound to include as defendants all who are known to him to have a title to, or lien upon, the equity of redemption. The knowledge may be either actual or presumptive. It is presumptive where it is simply inferred, either from the public records or from acts of possession by some one, in the character of owner. The right cannot be affected by an unrecorded conveyance of which the mortgagee has no actual notice. If the grantee neglects to put his conveyance on the public records until after a suit has been instituted and a notice of *lis pendens* has been filed, he must be considered as, and entitled only to the rights of, a subsequent purchaser. To hold that a purchaser by an unrecorded conveyance, of the equity of redemption, before the institution of a foreclosure suit, must be made a party in order to bind his interest by the decree, would subject such actions to serious obstructions and difficulties—such indeed as could not be avoided by the most active scrutiny, and would be contrary to the spirit of our statutes requiring that notices of *lis pendens* should be filed, that conveyances should be recorded, and that judgment should be docketed in the counties where the lands to be affected by them are situated.

If, however, the holder of an unrecorded conveyance ought to be made a party in order to conclude his rights, the omission to do so is no defense to one who continues the recorded owner, as in this case, up to the time when his answer is filed. If he claims the benefit of having the purchaser from him made a party, he must first put himself right upon the records. I think, therefore, that the county judge was right in overruling the defense in this case, if indeed he had the requisite jurisdiction to act at all.

The more material question is whether the county judge had jurisdiction over an action to foreclose a mortgage of real estate. The action is clearly an equitable one. The constitution provides (article 6, § 14,) that "the county court shall have jurisdiction in cases arising in justices' courts and in special cases, as the legislature may provide; *but shall have no original civil jurisdiction except in such special cases.*" And subsequently, in the same section, that "the legislature may confer equity jurisdiction in *special* cases upon the county judge." The latter clause was probably unnecessary, as it had been substantially included in that which I have first quoted. The word "cases" applies as well to suits in equity as to those at law. It was no doubt deemed proper to particularize in a distinct provision cases in equity, in authorizing the delegation of an entire new power to an inferior tribunal. I conceive, therefore, that the negation of any original jurisdiction except in special cases is applicable to suits in equity. The language is broad enough to include them; and there can be no presumption that the convention which framed the constitution intended to authorize the delegation to the county judge of a more extensive jurisdiction in equitable suits than in actions at law.

The legislature, in the judiciary act of May 12, 1847, (article 4th, § 31,) in terms conferred upon the county courts jurisdiction in suits for the foreclosure of mortgages when the mortgaged premises are situated in their respective counties. The code (*Title* 4, § 30) provides that the county court has jurisdiction in what it denominates certain "special cases;" among which is the action for the foreclosure or satisfaction of a mortgage and the sale of mortgaged premises situated within the county, and the collection of any deficiency on the mortgage, remaining unpaid after the sale of the mortgaged premises. If actions in equity to foreclose mortgages of real estate in the counties where the courts are held and the defendants reside or can be found, are special cases, this purported delegation of power and jurisdiction is valid; otherwise it is not.

The mere denomination of these cases as special, in the code,

does not constitute them such. The power was not conferred upon the legislature to alter the character of any existing class of cases from general to special; for that would have virtually repealed the restriction. As the constitution does not define the word "special," its meaning must be ascertained from other appliances. Two of the definitions of the word "special," given by Mr. Walker and Dr. Worcester, are "extraordinary" and "uncommon." It denotes something varying essentially from what is ordinary. Judge Gardiner says (*Kundolf* v. *Thalheimer*, 2 *Kernan*, 595) that this word special, as used in the constitution, "designates or was designed to designate a particular sort possessing certain characteristics which distinguish them" (it) "from those ordinary cases which the common law had arranged and classified." Bills for the foreclosure of mortgages were entertained by the court of chancery in England, and constituted an ordinary and extensive branch of its jurisdiction, at the time of our separation from that country. The court of chancery possessed and exercised the same powers and jurisdiction in this state until that tribunal was abolished, and its powers were transferred principally to the supreme court. When our present constitution, by which the change was effected, went into operation, there was no class of cases to which the term "ordinary" or "common" could be applied with more propriety than to these foreclosure suits. There was nothing in the mode or character of the procedure in such cases to render them special. There were some peculiarities appertaining to them, but not more, either in number or importance, than what distinguish other classes of equitable jurisdiction. Diversity in some particulars, in classes, does not constitute either of them special, if they are each general in their application, and if they agree in their essential characteristics. Otherwise each class of equity cases would be special, and the intended restriction in the constitution would be wholly nugatory. The restriction applies to cases, and cannot be evaded by any limitation as to locality, either of the subject matter or of the parties, or as to the amount, so long as the essential characteristics are retained. Thus it was decided in the case which I have cited from

Kernan, (2 *Ker.* 593,) that an action for an assault and battery was not rendered special by limiting the claim to $500, and the parties defendants to residents of the county. Judge Gardiner remarked, (*p.* 599,) "if the action of assault and battery was a case excepted, it is impossible that the legislature could convert it into a special one by the grant of a limited jurisdiction to the county court in respect to it, when they were expressly forbidden to confer any jurisdiction whatever." Judge Hand remarks, in the same case, that "when the organic law declares in emphatic and clear language, that these [county] courts shall have no original civil jurisdiction except in special cases, something real was designed, and there should be no effort to abrogate the injunction, or to fritter away the constitution while seeming to acquiesce." The same learned judge remarks that perhaps a different rule might prevail in equity, "as the range of special cases may be greater in equity than at law." That may create some difficulty in the application of the provision to cases not distinctly marked in this respect, but certainly none where their character is clear and well defined." I am satisfied that actions to foreclose mortgages and sell the mortgaged premises, at the time of the adoption of the present constitution, formed an ordinary class of cases in equity, and cannot be considered as special, within the true meaning of that instrument. The attempt by the legislature to confer jurisdiction upon the county court, in the prohibited cases, cannot and ought not to be sanctioned by our courts.

The county court had no jurisdiction in this case, and its judgment should therefore be reversed, and the complaint should be dismissed, but without costs.

Judgment reversed.

[Kings General Term, October 14, 1856. *Brown*, *S. B. Strong* and *Emott*, Justices.]

23 103
26 634
32 136
35 405
37 55
41 136
33h 609
54h 564
21a 474
24a 565

HOLDANE *vs.* THE TRUSTEES OF THE VILLAGE OF COLD SPRING.

Where there has been an unequivocal dedication, by the owner of lands, to the public, for use as a highway, manifested by acts and declarations, and the road so dedicated is susceptible of public use or passage, so as to be made or become a highway, and it has been openly used in pursuance of the dedication, no formal act of acceptance by the public authorities is necessary, to give to the public a right to its unrestricted use, and that not as an easement or appurtenance to adjoining lands, or as a private right, but as a public right, requiring no interest in the neighboring property, or even business with its occupants, to justify its exercise. S. B. STRONG, J., dissented.

User by the public is a sufficient acceptance of the dedication.

But neither the intention to dedicate land to the public for the purposes of a street, nor the use thereof by the public in that manner, can make it a highway, or confer upon the public the rights of a highway in that which will not answer the settled definition of a highway.

Therefore, a *cul de sac*, or street which is closed at one end, and only communicates with a public road at the other, is not susceptible of dedication to public use as a highway.

It is essential to a public right, or a public use of a road, that it should be a *thoroughfare*; and that it should not be the means merely of access to the property of private persons, but the means of passage for the whole community from one public place to another. Without this, whatever private privileges may be created, no public rights arise.

Such a road could not be made a highway by laying it out as such, or other action, by the public authorities; neither can it become such by dedication.

APPEAL, by the defendants, from a judgment entered upon the report of a referee. The complaint alleged that the plaintiff had purchased from Frederick Philipse and others, who were the owners at the time of such purchase, and was entitled to, and was in the actual possession of, a certain piece of land situate in the village of Cold Spring, in the county of Putnam, bounded northwesterly by lands of George P. Morris; northeasterly by lands of the said Frederick Philipse and others; southeasterly and easterly, partly by lands of the said Frederick Philipse and others, and partly by Northern avenue, so called; and southwesterly by lands of the said Frederick Philipse and others, containing ten acres and a half, be the same more or less. And that said lands and premises were, by agreement of the plaintiff with the said George P. Morris and the said Fred-

erick Philipse and others, made subject to this provision and condition: that in case the plaintiff should subdivide and lease or sell the premises, in a specified number of smaller parcels or lots for building purposes, then so much of the above described premises as is included within the lines of Morris avenue, as heretofore surveyed and contemplated to be made a public street or highway by the said Frederick Philipse and others, the former owners thereof, but never yet actually dedicated or laid out as a public street or highway, being one chain wide, and about six chains and twenty-eight links long on the longest or easterly side thereof, and extending from the line of the lands of George P. Morris, southeasterly to the northwesterly line of Northern avenue, as laid out and opened, should be dedicated as a public street or highway, and thrown open for public travel, but not otherwise; and subject also to the right of way reserved and granted, or agreed so to be, to George P. Morris and his assigns, and to such other persons as shall be or become entitled thereto, through and over a part of said contemplated avenue. And the plaintiff further alleged that he had never subdivided and leased or sold the said premises in smaller parcels for building purposes, or any part thereof; and that said Morris avenue, as surveyed and contemplated as aforesaid, and included within the general boundaries of the piece of land above described, had not, nor had any part thereof, ever been used, opened or dedicated to the public as and for a public street or highway; and that until the same should be so dedicated, or should legally or in due form of law be made or become a public street, the plaintiff was entitled to a private right of way, in common with George P. Morris or his assigns, or such others as might be or become entitled thereto, in and over a strip of land of forty feet in width through the middle of said contemplated avenue, and extending from the land of George P. Morris to the northwesterly line of Northern avenue, and also to the sole use and occupation of so much of said contemplated avenue as was not comprehended within said strip of forty feet; and that he had the right and privilege of enclosing said contemplated avenue, subject only to the rights therein of

said George P. Morris and his assigns, and the other persons who may be or become entitled to such right of way. The plaintiff further stated that he made and erected fences on the said contemplated avenue, and granite gate-posts or columns along the northwesterly line of Northern avenue as now opened, for the purpose of enclosing the said contemplated avenue from the public highway or street, as he had and has a right to do; and that the said fences and gate-posts, or columns, were the same alleged obstructions mentioned and referred to in the notice and resolution hereinafter mentioned. That the freeholders and inhabitants of the village of Cold Spring were constituted a body corporate, by the name of "The Trustees of the Village of Cold Spring," passed April 22, 1846; and that the defendants, as said trustees of said village, now pretend and claim, that the said contemplated avenue is a public highway or street, and claim to exercise authority over and make regulations in relation to it as a pnblic street of the village of Cold Spring; and that on or about the first day of September, in the year 1853, the defendants caused to be served on the plaintiff a notice and copy of the resolution passed by them, referred to in said notice, of which the following are copies, to wit:

"JOHN H. HOLDANE, ESQ.

Sir: The following is a copy of a resolution passed by the board of trustees of the village of Cold Spring, on the thirtieth day of August, 1853:

Resolved, That John H. Holdane be notified to remove the obstructions he has placed on Morris avenue, such as stone columns, fences, &c. on or before the 7th day of September, 1853, or that the trustees of the village will cause the same to be removed.

You are therefore required to remove the obstructions accordingly. August 31, 1853. By order of the board of trustees.

E. A. PELTON, Clerk."

And the plaintiff was informed and believed, that the defendants, in accordance with such resolution passed by them, intended to, and would, unless restrained by the court, tear down, destroy and remove the said fences and granite gate-posts or columns,

so erected by the plaintiff on said contemplated avenue. The plaintiff therefore prayed that the defendants might, by the order and judgment of this court, be restrained from tearing down, destroying or removing the said fences and gate-posts or columns so erected on said contemplated avenue, and from removing or interfering in any manner with any buildings, fences, walls, gates or other erections which now are or may hereafter be put upon said contemplated avenue by the plaintiff, or with the land; and also from exercising any authority or control whatever, over the said contemplated avenue as a public street or highway, until the same should be dedicated to the public, or otherwise become a public street or highway.

The defendants by their answer admitted that the plaintiff had purchased, or agreed to purchase the lot of land mentioned in the complaint, under the circumstances and in the manner hereinafter more particularly mentioned. But they denied that he was in the entire possession of the said lands; and, on the contrary thereof, alleged that the public pass over the said avenue without any molestation, or any attempt at hindrance; and they always have done so since the said street was opened, in or about the year 1850, as hereinafter mentioned. And they denied that said Morris avenue, as included within the general boundaries of the land mentioned in the complaint, had not been used or opened to the public, as and for a public street; and, on the contrary thereof, alleged that in or about the fall of the year 1850, the heirs and devisees of M. Gouverneur, deceased, who were then the owners of the land over which the same passed, opened Morris avenue from the northerly side of Main street, at a point opposite to Chestnut street, in said village, to within about sixteen feet of the land of George P. Morris, and fenced the same, on both sides thereof, the whole length of said avenue, and also worked or graded the same, and placed it in a condition for public travel; that, as so opened, worked and fenced, the avenue was sixty-six feet wide, or thereabouts, and was thrown entirely open the whole length thereof, from Main street to near the lands of George P. Morris, with the intention, as the defendants were informed by one of the said heirs.

of making a perfect abandonment or dedication of it to the public, as and for the purposes of a public street; and that from the time it was so opened, it had been used as such, unconditionally and without any limitation or restraint, by the public. That in the spring of the year 1852, John Bevan made a map of the village of Cold Spring, and that, by direction of the said heirs, as the defendants were also informed by one of them, the streets in said village which were nominal and proposed, and which had not been opened for public use, were bordered by dotted lines, and the opened, permanent streets by smooth lines; and that by their direction, also, the following note or memorandum was put on the said map: "The streets and avenues, whenever designated by dotted lines, are only nominal and proposed, and may be altered or abandoned; and the lands upon which they are located are in no way to be affected thereby." And the defendants averred that Morris avenue was bordered on the said map by smooth lines the whole length thereof. That they were informed and believed, and therefore stated, that the plaintiff, well knowing the premises, and the facts and circumstances, as above mentioned, respecting the opening and dedication of Morris avenue, and being informed of the same by the heirs themselves, made a purchase of the heirs, of the lot of ground on which his house now stands, on the westerly side of Morris avenue, consisting of about four acres, and received a deed therefor from Frederick Philipse and others, the said heirs, which bounded the lot in terms on the easterly "by the side of Morris avenue." That subsequently, and sometime in or about the summer of 1852, the plaintiff agreed with the said heirs to purchase another lot of about five acres of land, on the easterly side of Morris avenue and directly opposite the lot last mentioned, for which no conveyance has been delivered; that after the purchase of this last piece the plaintiff applied to the said heirs to purchase Morris avenue, from the line of Northern avenue to the land of General Morris aforesaid, and was told by them, or by one of them, with whom he was transacting the business, that they could not sell it, for the reason that it had been permanently abandoned to the public for a

street; that the plaintiff nevertheless insisted upon buying what interest the said heirs had in the said street, which they finally agreed to sell him, but that no deed for this either, had ever been delivered. That at the plaintiff's solicitation an arrangement was at this time entered into between him and the said heirs, by which he was to give back his deed for the four acres first purchased, to the said heirs, and receive from them another deed, for the whole of his said purchase, including the said four acres, with a condition therein giving General Morris and his assigns a right of passage through the center of said avenue, for the purpose, as the defendants believed, of destroying all written evidence of the existence of Morris avenue through the said land, and of defrauding the public of their rights therein; but that this arrangement had not yet been perfected.

The defendants further alleged, that the plaintiff had obstructed this street as so opened and worked, as mentioned in his complaint in the cause, by placing four stone columns or posts across the same near Northern avenue, and setting his fences in and on the said avenue, from the said posts to the termination of the said street near the lands of Gen. Morris aforesaid, on both sides thereof, about thirteen feet each. That the avenue, since it was opened and worked by the heirs as above mentioned, had been worked and repaired by the defendants, who had always claimed authority over it for that purpose, and had never been interfered with in the exercise of it in any way, until the interference of the plaintiff, as mentioned in his complaint. The defendants, upon information and belief, denied that the plaintiff was entitled to the sole use and occupation of so much of the said avenue as was not included within a strip of forty feet through the middle of the same from the lands of Gen. Morris to Northern avenue, or that as against the public he had the right to close up the said avenue, subject only to the rights therein of Gen. Morris and his assigns, and the other persons who may be or become entitled to such right of way. They admitted that the plaintiff had made and erected fences on the said avenue, and also four granite columns across the

same, on a line with the northerly side of Northern avenue, for the purpose of closing the said street from the public, and that the said fences and posts were the same obstructions referred to in the notice and resolution mentioned and set out in the complaint; but the defendants, on information and belief, denied that the plaintiff ever had, or now has, a right to erect the said fences or posts on the said avenue, as claimed in the complaint. The defendants admitted that the inhabitants of the village of Cold Spring were incorporated by the name of the Trustees of the village of Cold Spring, by the act, and at the time, mentioned in the complaint, and that the act of incorporation was duly adopted by the electors of the village; and further, that the defendants, as such trustees, claim that the said avenue is a public street, and claim to exercise authority over it, and to make regulations in relation to it as a public street of the village of Cold Spring, and that they caused the notice and copy of resolution to be served on the plaintiff, at the time and of the purport mentioned in the said complaint. And they also admitted that in accordance with the resolution, they intended to remove the obstructions, as they were advised by counsel and believed they had a right to do. And they further alleged, that they were advised and believed and therefore stated on such information and belief, that the said avenue had been dedicated to the public as and for a public street.

The plaintiff put in a reply, denying most of the allegations in the answer. He admitted, however, that the deed for his first purchase bounded the same, in terms, on the easterly by the side of Morris avenue.

The cause was referred to *James Emott*, Esq. in October, 1854. He found and determined as follows: 1. That by or before January, 1853, and before the commencement of this action, the plaintiff had made an agreement for the purchase, from the heirs of Mary Gouverneur, of the lands described in the complaint, including the strip of land hereinafter mentioned and known as Morris avenue, so called; that he had paid a portion of the purchase money therefor, and taken possession thereof.

2. That such purchase by the plaintiff, of the strip of land which was fenced and opened as the prolongation of Morris avenue, from Northern avenue northwardly through said lands to the south line of George P. Morris, was expressly made subject to any rights which the public might have in or to the use of said land as a public street or highway.

3. That in the year 1850, the heirs of Mary Gouverneur, being then the owners of all the lands aforesaid, caused to be opened and fenced the said strip of land running through the lands sold by them to said plaintiff, and being the prolongation of Morris avenue, from its intersection with Northern avenue to the south boundary of lands of George P. Morris, which is also the north line of the village of Cold Spring, with the intention of dedicating the same to the use of the public as a highway, and that such strip of land was mapped and designated as a highway by the consent and direction of the said heirs of Mary Gouverneur, or their agent in charge of said property, upon the map of the village of Cold Spring made and published by John Bevan.

4. That said strip of land so opened and fenced, was used by the public from that time, by walking and driving upon the same, and by going up to the enclosure of George P. Morris, and returning over and by the same, until it was closed by the plaintiff.

5. That said road, so opened and fenced and used, led and extended from and out of a public road leading from Main street northwardly, and known as Morris avenue, at its intersection with a public road running east and west along the south line of the plaintiff's lands, and known as Northern avenue, to the south line of the lands of George P. Morris and the north line of the village of Cold Spring, and that said road terminates on the north at the enclosure of George P. Morris, without reaching any public highway or road.

6. That in July and August, 1853, the plaintiff erected stone gate posts upon and across the southerly end of said road or strip of land, where the continuation of said Morris avenue would enter his lands, and moved the fence along the same in and

upon said strip of land, thereby obstructing the same and impeding the public use thereof.

7. That the defendants thereupon, in the exercise of their authority over the streets and roads in said village, gave notice to the plaintiff to remove said obstructions by a certain day or they would cause the same to be taken down.

Upon these facts, the referee's conclusion and decision, was, that the said road or strip of land fenced and opened for a road, and which the plaintiff obstructed, was not a public highway; and that the plaintiff was entitled to a judgment restraining the defendants from tearing down or removing the gate posts, fences, or other erections of the plaintiff upon or along the same, with costs.

The following opinion was given by the referee, at the time of making the above decison:

"I think the evidence in this case established an unequivocal intention, on the part of the Gouverneur heirs, to dedicate as a street what is called Morris avenue, through the lands now owned by the plaintiff, to Gen. Morris' line, and terminating at his fence. In the first map of their property made by them, a street is laid down under this name, having the same general direction and character, though not absolutely identical with, the present northern extension of Morris avenue. In 1850 they fenced and opened a strip of land of the width of 66 feet, from Northern avenue to Geo. P. Morris' land, with the intention of making it a street; and if they did not work and grade it, the reason seems to have been, that the land was so smooth as not to make it necessary in their judgment to do so to make it a passable road. Upon the map of the village of Cold Spring, made by Mr. Bevan in the year of this extension, Morris avenue was indicated as an open street, with the assent and under the direction of the Gouverneurs. The public used it, as far as a street of such a character, not being a thoroughfare or passage from one highway to another, is susceptible of use. It is true, the dedication is recent and the period of user brief, but I apprehend that is not material upon a question of dedication, except

when the proof of dedication rests upon user alone, and the consent of the owner is to be made out wholly from the use by the public.

Whenever distinct and unequivocal acts of dedication by the owner are shown, no lapse of time can strengthen the proof of his intention to abandon the entire dominion which he has of his property, and bestow upon the public the right to its use. I think there is sufficient proof here, that this strip of land was fenced and thrown open to public use, as well as designated upon a map by the Gouverneur heirs, as a street, with the intention on their part of making it such, and so far I have no difficulty with the case.

It is claimed by the counsel for the plaintiff, that no dedication of a street to the public can be complete or effectual until it has been accepted, and that the acceptance must be made by the public authorities, the commissioners of highways, and can only be made by instituting the proceedings prescribed by the statute for the laying out, opening and recording public highways. This is Judge Harris' opinion in the case of *Clements* v. *West Troy*, (16 *Barb.* 251,) which was cited on the argument. I was unable at the time to reconcile the views taken in this opinion with my ideas of the doctrine of dedication, and even of the powers and duties of commissioners of highways, and was hesitating as to how far I should be bound by the authority of the decision. Since the argument, however, I have received the report of the trial of the same cause at the circuit, before Judge Wright, (10 *How. Pr. Rep.* 199,) where the doctrine of Judge Harris is expressly contradicted, and the case decided upon totally different principles. I think the views taken by Judge Wright, in his opinion, coincide with what has been the general opinion of the profession on questions of dedication. It seems to me that the commissioners of highways, or the defendants, acting as such, have no authority to perform such acts as Judge Harris supposed to be indispensable to effectuate a dedication of a road, unless there has been a user for 20 years, and then they will proceed on the ground of the user, and not of a dedication. In fact, the reasoning of Judge Harris would cut up

by the roots the dedication of streets or roads in the country. Besides, it is to be remembered, that the doctrine of dedication does not rest upon contract or the presumption of a grant, but is the creation of the courts to effectuate the intention of the party making the gift, and to subserve the public interest, when from the nature of the case, from the character of the right or interest to be created, or of the persons or party for whose benefit the gift or grant is intended, no grantee is in existence to take, or no grant could be made. (*See* 6 *Peters*, 431.) It seems therefore to be the doctrine of the cases, and to be sanctioned by the reason of the thing, that the use by the public of the highway intended to be dedicated, in the manner and to the extent contemplated by the dedication, furnishes the requisite evidence of acceptance of any dedication which is proved by acts on the part of the owner.

But a question still remains in this case, upon which I have had more difficulty, and on the decision of which I think the case turns. That is, the question whether a street or road can be dedicated as a public highway, which is closed at one end, and only communicates with a public road at the other; in short, what is known as a *cul de sac*. To show that this could be done, the learned counsel for the defendants cited to me two classes of cases. First, the cases which have upheld the dedication of lands or property for other purposes than roads, as a public square, a common, a burying ground, or a spring of water for public use. There no longer remains any doubt that such dedications can be made, and there is no doubt that such a strip of land as that included within the limits which bound what has been described as Morris avenue in this case, could have been dedicated for any of these purposes other than a road. It is not claimed, however, in this case, that any such dedication has been made. The claim, both in the pleadings and proofs, is of a dedication to be a public highway; and I am unable to see how the principle to which I have just adverted will help the defendants in this case. When a piece of ground is dedicated to the public for a square or burying ground, what they are to acquire, and what they are to use and accept, is not a right of passage upon

or over it, and the question of its susceptibility for use as a highway does not arise. But when a piece of ground is to be dedicated and accepted as a highway, what the public are to acquire and use, is a right for every person, not to have access to the property of any individual, but to pass and repass over a highway for the whole people. Whatever rights individuals might acquire under any circumstances by the opening and publishing such a street as this as a public highway, I think the public do not take any rights by such proceedings, unless such a street as this can be recognized as a legitimate public highway. I do not mean a highway under all the highway acts, so as to subject the town in respect to it to the duties and liabilities of the statutes respecting statutory highways. The doctrine of the Oswego case, in 2 *Selden*, 257, applies, as I understand it, to these duties and liabilities created by statute. But I mean a highway within the settled meaning and definition of a highway at common law. To prove that this street, closed at one end, leading up to the entrance or fence of Gen. Morris, and there terminating, and thus forming a *cul de sac*, could be such a highway, I was next referred to a class of cases in the English books, which, the counsel for the defendants claimed, recognized expressly such closes or streets as public highways. I have carefully examined all these cases, but I do not think they establish such a doctrine. In the case of the *Rugby Charity* v. *Merriwether*, reported in 11 *East*, 375, *note*, Lord Kenyon did indeed leave the question to the jury, whether the *locus in quo* was a common highway, with the remark that it made no difference that it was not a thoroughfare; but he puts it on the ground that in a great town like London, where there are so many closes of great antiquity, any other doctrine would be unsafe. Besides, this case, which was only a nisi prius case, has been disapproved on this very point. In *Woodyer* v. *Hadden*, (5 *Taunt.* 142,) the opinion of Lord Kenyon was questioned by Lord C. J. Mansfield, and again by Abbott, C. J., in *Wood* v. *Veal*, (3 *B. & Ad.* 454,) where that learned judge observed, "I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the

use of it." This latter case does not decide the point, but the doctrine of a highway in a close is doubted by all the judges. In *Jarvis* v. *Dean*, (3 *Bing.* 447,) the road in question was opened, at both ends, to public roads, and the question was left to the jury whether it had been used as a thoroughfare; and if so, they were authorized to presume a dedication. *Woodyer* v. *Hadden* decides nothing in favor of the principle contended for, and all the judges but one question the doctrine of the case of the *Rugby Charity*. In our own courts, I am aware of but one case containing any thing to sanction the doctrine of a highway in a *cul de sac*, and that is an *obiter dictum* of Hand, J., in *Wiggins* v. *Tallmadge*, (11 *Barb.* 457.) The case, however, was not decided on this ground, and even this dictum was disapproved by Cady, J., in a dissenting opinion.

The old definition of a highway is familiar to every one. It must be a road without termination—that is, leading from one public highway into another. Nothing but a thoroughfare will answer such a definition. Such a street as this will not. I think I am compelled to hold that such a street as this cannot be dedicated as a public highway; and upon this ground I place my decision in favor of the plaintiff. I have not examined the question as to the extent of the authority of the defendants under their charter, as commissioners of highways, because that is unnecessary in the view I have taken in this case."

H. W. Warner and *J. O. Dykman*, for the appellants.

W. C. Hasbrouck, for the respondent.

Emott, J. This cause was tried before me as a referee, and the judgment from which the defendants appeal was entered by my direction. I have bestowed upon the argument made by the learned counsel for the appellants, and upon the authorities which he has adduced, careful examination and reflection, without being able to come to any different conclusions from those which I reached when the cause was tried. Perhaps I shall not be able to add any thing to the reasons which I then assigned

for the judgment, and I do not purpose to enter upon any further discussion of the authorities. But since, while the court now are all agreed that this judgment should be affirmed, we differ, and perhaps materially, in our views of the questions involved in the cause, I will state as briefly as possible the grounds on which I think our decision should rest.

There were two questions of fact in the cause: first, whether the Gouverneur heirs had done any thing, and what, to dedicate the strip of land in controversy to any public use; second, whether the public had done any thing, and what, to indicate their acceptance of the dedication. I had supposed that both these issues were disposed of at the trial, and the facts found clearly and explicitly, so that the case might be decided upon its legal principles. So the counsel for both parties evidently thought, and therefore nothing but the conclusions of the referee are included in the case, and none of the evidence is put in by either party. I do not see how we can go behind those conclusions, or dispose of the present appeal except upon the basis of the facts found in the court below, and assuming these to be the facts of the case. Now these facts are, as to the dedication by the Gouverneurs, in the first place, that this strip of land was marked and mapped by their consent and direction as a public street by the name of Morris avenue, upon a map of the village of Cold Spring, made by one Bevan in 1850. There was no pretense that this map was made by or for the defendants or any public officers. That is no part of the case. Whether it was made by Bevan on his own account, or in the employment and by the direction of the Gouverneur family, is quite immaterial. As to this street it was their map; because this piece of ground was marked out and designated upon it as "Morris avenue" by their direction; and that was as much their act as if Bevan had been solely employed by them or had made a map of their property only. There was another map of the village, earlier than Bevan's, which is mentioned in the pleadings and was introduced at the trial. What effect this might have had, or indeed what effect it ought to have had upon the questions in controversy here, it is impossible for us to determine, and cer-

tainly it is unnecessary to discuss. The point is not made or presented by any exceptions or otherwise. Besides, the subsequent acts and declarations of the owner of this land, if they are unequivocal and sufficient, must be decisive. If the first map published did not afford evidence of an unqualified design to dedicate this street, yet if that deficiency was supplied when Bevan's map was put forth, then the case is so far complete, and the tenor and effect of the first publication is immaterial. Especially is this so when this latter map is considered in connection with the contemporaneous action of the Gouverneurs, which I am next to mention.

For in the next place, at or about the date of this map made by Bevan, the Gouverneurs fenced this strip of land as a street and threw it open to public use, and so it remained until the plaintiff shut it up, in 1853. I think now, as I thought at the trial, that the evidence in the case clearly established that this strip of land was fenced and thrown open to public use, as well as designated upon a map as a public street, by these owners, with the intention of abandoning their entire dominion over it, and of bestowing upon the public the right to its use as a highway. Whether I was right then or now in this conclusion is not, I apprehend, a question, on the present appeal; because the act, and the intent which is a part of it, are acts expressly found as facts, and there are not only no exceptions to these conclusions, but none of the evidence before us from which to ascertain whether they are correct. Besides, I do not choose to rest my judgment upon a presumption drawn from principles of law purely, and in direct contradiction, not only to the facts found by the court below, but to what was manifestly the real intention of the parties. I do not choose to decide this case upon a presumed design not to make this a public street or highway, to be forced as it were upon the Gouverneurs and their acts by legal rules or inferences resulting from the situation of the lands. The fact is, I think, unquestionable, that they not only had, but manifested in the most explicit manner, the intention to open and dedicate this as a public street. I prefer to admit this, and to hold that their attempt was ineffectual, in conse-

quence of the situation and character of the road which they attempted to dedicate, and from the effect of what I consider to be well settled rules of law applicable to such a case. Then if I was in error as to these legal rules and principles, that error can be corrected, and the original intention of the owner of these lands effectuated, or the cause retried by different rules. And it strikes me that to say that the Gouverneurs must be presumed not to have intended to dedicate a public street or highway because this piece of land which they opened, fenced and declared to be such, was not a thoroughfare, is only saying indirectly what was expressly and directly enunciated in the judgment below, that such a street is not susceptible of dedication to public use as a highway. The intention of the owners of these lands is a fact, and it is proved and determined as such in the case before us, as well as the manner in which it was manifested and declared. Whether that intention, any more than a public user of a road, can make that a highway or confer upon the public the rights of a highway in that which will not answer the settled definition of a highway, is the real question which I think ought to be decided in this case.

Nor is there any more doubt as to the facts of the case bearing upon the second issue—the acceptance of this dedication or attempted dedication. It was fonnd, and decided by the referee, that this strip of land "was used *by the public*, by walking and driving upon the same, and by going up to the enclosure of George P. Morris and returning over the same until it was closed by the plaintiff." This user was by the public, by any body and every body. It was not, as has been suggested, by the occupants of adjoining lands, for there were none until the plaintiff built, and then shut up the road. It is said the answer and reply show that the road did not in fact run to George P. Morris's land, because the one alleges and the other admits that it stopped at a point sixteen feet from his line. As the evidence is not in the case I am unable to say which is correct, the answer or the report. If the question had been considered of any consequence it would have been pointed out at the trial, and now, I take it, we must assume the referee's report to be

true. But it certainly is entirely immaterial whether this road stopped at the line of George P. Morris or sixteen feet south of it, or in the lands of the plaintiff, or of the Gouverneurs, or of any body else, so that it stopped short of reaching and running into another highway. That is all that is material, and that is beyond dispute.

And it is equally beyond dispute that there have been no formal acts of the public authorities, no laying out or recording by the commissioners of highways or the defendants acting as such, if any such acts are necessary to complete a dedication. The acceptance is made out here, if it is made out at all, by user on the part of the public. Upon this part of the case my conviction is clear and decided, that when there has been an unequivocal dedication by the owner of lands to the public, for use as a highway, manifested by acts and declarations, and the road so dedicated is susceptible of public use or passage, so as to be made or become a highway, and has been openly used in pursuance of the dedication, no formal act of acceptance by the public authorities is necessary to give to the public—to every person in the community—a right to its unrestricted use, and that not as an easement or appurtenance to adjoining lands, or as a private right, but as a public right, requiring no interest in the neighboring property, or even business with its occupants, to justify its exercise. The very able opinion of Mr. Justice Wright in the case of *Clements* v. *West Troy*, (10 *How. Pr. R.* 199,) is entirely satisfactory to my mind upon this question, and I can add nothing to his reasoning. I will only observe that it is not the question now, any more than it was in that case, whether commissioners of highways can be compelled to maintain and repair a road which has become public only by the dedication of the owner, accepted by open and common use. There is a distinction between a free and public right of passage or way over lands, and a statutory highway, which the public authorities are bound to support. I understand such a distinction to be recognized in the Oswego case, (2 *Selden*, 257,) which was cited in the court below, and that the public officers are not bound to assume the burden because

the public enjoy the benefit. At all events, here is no attempt to force such a burden upon these officers; they come in voluntarily and attempt to protect the right of the public to the use of what they claim has become a public highway by dedication. It might perhaps admit of some doubt, whether the defendants are clothed with right and authority to interpose to enforce the rights of the public in a road not strictly within the jurisdiction of commissioners of highways. But that is a question not, I think, now before us, and upon which I do not intend to pass.

I think the difficulty in the way of the defendants in this case is, that the road in question could not be made a highway, so that the public could acquire a right of free and indiscriminate passage, such as they could assert, or the defendants protect. It is, I suppose, settled that such a road could not be made a highway by laying out or other action of the public authorities. So it has certainly been held in this district. I cannot see how that which cannot be made a highway by the legal action of the public authorities, under the statutes, can become such by dedication. And it must be remembered that the right asserted by the defendants was a public right; the dedication which they claimed was of a highway, and no other right of a different character, or of a less extent, could be invoked in this action, if any such exist. Whether the acts of the Gouverneurs were such as to give to any individual a right of passage over this land, or to have this so called avenue kept open and unobstructed, are questions which we are not now called to determine, and upon which our present decision will have no effect. The observation of an eminent English judge, to the effect that these closed passages or streets should not be allowed to become traps to catch trespassers, has undoubtedly great force, in its proper application. But that remark was made in reference to private rights alone, and where these only were in question. It is not necessary in order to protect individuals in any proper use of ingress and egress to lands or property adjoining such places, that the means of such access should be declared or become a public highway. On the

other hand, the danger is that by such an application of the doctrine of dedication as is here contended for, such places, or "courts," as they are sometimes called in cities, may become traps for their owners or purchasers. There are estates in the city of New York, or perhaps the union of lots of two or three owners, fronting on and opening into great thoroughfares, extending back for a very considerable distance, built up around three sides of an open court or square thus formed, leaving the fronts open to the street for the convenience of the tenants of the various offices and apartments in the buildings. Are we prepared to decide that the acts of the owners of such property have made these lots a part of the public street, dedicated them as a highway and forfeited the right to their occupation or control? Why not, however, if such a *cul de sac* as this can become a public highway by opening and common use? The persons traversing such a court or place in a great city are a thousand-fold more numerous, more constant and diversified than will ever enter the street in question. Here the opening is as free and unqualified without obstruction to a public thoroughfare, and it is designated by a name indicating the express purpose of common user. Where does the analogy fail, unless in the want of marking and naming as an "avenue" on a published map, which we have in the case at bar? But I think we should hesitate to hold, in any such case, that any designation by the name of a court or public place, any opening to public or private convenience, any use of such a court by all who might be attracted by business or curiosity to the buildings or apartments to which it gave access, would deprive the owner of the land of the right, upon extinguishing all private rights of passage and all estates to which any such right might be appurtenant, to resume his dominion of his property, to close up entirely the court or square, or to erect upon it any building which he saw fit. And if so there, why not here? The true ground upon which these cases are to be put is, that in them all is wanting one thing that is essential to a public right or a public use of a road or way, and that is, that it should be a thoroughfare; that it should not be the means merely of access to the property of

private persons, but the means of passage for the whole community from one public place to another. Without this, whatever private privileges may be created, no public rights arise.

I do not purpose to enter into any detailed examination of the additional authorities furnished to the court, on this appeal, by the assiduity of the learned counsel for the appellants, and not adverted to in the opinion in the court below. It is enough to say that I do not discover in any of them, after an attentive examination, any assertion or decision that a road which is not a thoroughfare can be, or be made a highway.

For the reasons which I have thus rapidly given, I am satisfied that the decision was right. In the views which I have expressed the presiding justice concurs, and we are all agreed that the judgment should be affirmed.

BROWN, P. J., concurred.

S. B. STRONG, J. The referee finds that the former owner of the strip of land now claimed by the defendants as a public highway, caused it to be opened and fenced with the intention of dedicating the same to the use of the public as a highway, and that the same was mapped and designated as a highway, by their consent and direction, upon the map of the village of Cold Spring, made by one Bevan. But whether the surveyor was employed by such owners or by the public authorities of the village, is not stated by the referee. The plaintiff alleges, in his reply, that the map was made by Bevan on his own private account. The evidence before the referee is not reported, and we have nothing definite to show whether the surveyor acted in a public, or in his private, capacity. We cannot, therefore, assume that his conduct evinced any determination on the part of the public, to accept the proposed dedication, if indeed any was designed.

Clearly, an intent to dedicate land to the public use is insufficient, of itself, to constitute a valid dedication. It must be accompanied by acts which designate and open the land for the public use. A mere designation in a private conveyance, is

not enough to constitute a dedication, at least in rural districts. (*Badeau* v. *Mead*, 14 *Barb.* 328.) Why it should be considered as having that effect in cities, I could never understand. A private conveyance will undoubtedly confer rights upon the parties, but not upon strangers, (and as to that the public are strangers,) except by way of remainder. It may evince an intention, but that is all, so far as the public is concerned. Throwing the land open by fencing it on each side, and not enclosing it by gates, would, unexplained, go far towards establishing a dedication. But even those circumstances might not be conclusive; and it seems to me that they were not, in this case. The supposed avenue did not extend entirely through the land of the owners. It stopped some 16 feet before reaching the land of General Morris. It did not cover, or extend to any public highway or street. It did not touch the land of any other person. The inference from this would seem to be that the proposed avenue was designed for the use of those only who should purchase lots bordering upon it. This inference would seem to be supported by a memorandum upon a lithographed map of the village, made previous to the spring of 1852. That states that the lands designated thereon for streets, avenues, public squares and other public purposes, are owned by the proprietors as private property, with the right of changing or discontinuing such streets, &c. But when a lot is sold fronting on any street not opened, the *purchaser* will be entitled to a right of way over the same from said lot to the nearest public highway; the right of sale being in all cases retained when not specially conveyed. This map anteceded Bevan's, and is at least as reliable, to show the intent of the land owners. It was competent for them to throw their lands open for private or public use, and if that was done purely for private use, it would not create a public right.

But a proposed dedication is not, is my opinion, valid unless it is accepted by the public. There are many serious responsibilities upon the public officers having the charge of public highways, and when they are in cities or chartered villages, upon the corporation, which cannot, and should not, be devolved

upon them solely by individual action. It would be an anomaly if private individuals could, by their own act, create a public right, and thus coerce a public duty. There must be something more—sufficient at least to indicate the assent of the public. Such assent would be clearly manifested by the exercise of a control over the dedicated property by the officers selected and entrusted by the people to manage and superintend congenial subjects. So, too, it would be indicated by common user under circumstances, and in a manner, evincing a claim of right, as distinguished from a mere license. But the circumstances should be strong to show that what is done is under title, and not by permission, in order that what has been allowed from kindness should not be converted into a thankless and irrelievable burthen. The referee finds that the strip of land in question was used by the public from the time it was opened and fenced, by walking and driving upon the same, and going up to the inclosure of George P. Morris, and returning over and by the same, until it was closed by the plaintiff. He does not explain, and it is difficult to conceive, how it could be used up to the land of George P. Morris, when it is admitted in the defendants' answer that it did not reach that land by a distance of sixteen feet. And as to any other usage, it may have been, and probably was, by the owners of the adjoining lots, who claimed under those who are alleged to have opened the avenue. There is no pretense that any public officer entrusted with the management of the public highways in the village, ever interfered in the matter. I conceive, therefore, that if any dedication was designed by the owners of the land, there is not sufficient to show that it was accepted, by or in behalf of the public, and that it was therefore incomplete, and it was competent for the owners to resume the entire property.

Without expressing any opinion upon the other question involved, I think that the judgment should be affirmed.

Judgment affirmed.

[Kings General Term, October 14, 1856. *Brown, S. B. Strong* and *Emott* Justices.]

MILLS *vs.* VAN VOORHIS.

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Where, upon a sale of land, a mortgage is given by the purchaser to secure the purchase money or a part thereof, the mortgagor and his grantees have each of them such a seisin of the equity of redemption in the land that their wives would be entitled to dower in that portion conveyed to their respective husbands subject to the payment of the mortgage.

The wives of such grantees can therefore, in case they survive their husbands, come in and redeem the mortgage, and so obtain dower.

Such an interest in the equity of redemption, and consequent right to redeem, cannot be barred or divested by a foreclosure or sale in a suit to which the wife is not a party; whether the right be, at the time, actual or inchoate. S. B. STRONG, J., dissented.

The wives of the grantees of the mortgagor are therefore necessary parties to a suit for the foreclosure of the mortgage.

When the title to land fails, especially where the vendor honestly supposed he had title when he contracted to sell the land, the remedy of the vendee is a proper action for damages.

Where the state of the title is fully known to both parties, at the time of contracting for the sale, and the vendor offers the purchaser all the title he has, he does all in his power to perform his agreement. And if the purchaser declines accepting that title, he cannot bring a suit in equity to compel the vendor to give a complete and perfect title.

The cases of *Jackson* v. *De Witt*, (6 *Cowen*, 316,) and *Cunningham* v. *Knight*, (1 *Barb. S. C. Rep.* 399,) so far as they deny the right of a widow to redeem her dower from a mortgage given for the purchase money, either entirely outstanding or foreclosed in a suit to which she was not a party, overruled.

APPEAL by the plaintiff from a judgment entered upon the report of a referee. The action was brought for the specific performance of a contract for the sale of real estate to the plaintiff, by the defendant. This contract was dated September 3, 1851. The defendant had previously, viz. on the 29th of August, 1835, sold a portion of the land to H. Learned, at the same time taking back from him a mortgage to secure the payment of a part of the purchase money. Learned afterwards sold several parcels of the land, to different individuals. A bill in chancery was subsequently filed to foreclose the mortgage given by Learned. A decree of foreclosure was obtained, in July, 1840, and the mortgaged premises were sold by a master. The defendant bid off the premises at the sale, and received a deed, dated July 17, 1840. Some of the grantees

of Learned had wives, at the time of the conveyance from Learned to them, who were not made parties to the foreclosure suit, and who are still living. The principal objection made by the plaintiff to the defendant's title was that these married women had an interest in the land, and that, not having been made parties to the foreclosure suit, they were not foreclosed.

The referee decided and adjudged that the plaintiff was not entitled to a decree for a specific performance of the agreement; but that he ought to recover from the defendant the sum of $597.41, being the amount paid by him to the defendant on the 3d day of September, 1851, on account of purchase money for the farm, with interest, and also his costs. And he further decided and adjudged that upon the payment of that amount and costs, the agreement should be delivered up to be canceled of record, &c.

Ingraham & Underwood, for the appellant. I. The title of the respondent to a part of the premises in question is imperfect. (1.) The wives of Tripp, Lloyd and Marston, and others, who purchased of Learned, were necessary parties in the foreclosure suit under which he purchased. (*Denton* v. *Nanny*, 8 *Barb.* 618. *Swaine* v. *Perine*, 5 *John. Ch.* 482. 10 *Paige*, 49, *opinion of Ruggles, V. C.*) (2.) Charles Coates, who held a mortgage on a part of the premises, made by Stephen B. Barker, and who is named in the bill of complaint as a defendant, in his own right, and also as survivor of one Butler, is not named in the decree except as such survivor, and he is not foreclosed by the decree as to his individual interest as mortgagee.

II. The respondent holds the mortgage so imperfectly foreclosed, and should be required to cure these defects and perfect the title; or if not, he should, after the delivery of his deed to the appellant, and taking the appellant's mortgage, be restrained from collecting the balance of the purchase money, and from assigning the mortgage until he shall perfect the title.

III. The conclusions of the referee as to the facts as well as to the law, are erroneous in the several respects and particulars mentioned in the appellant's exceptions to his report.

IV. The referee's conclusions of fact and law upon the testimony should have been as contended for by the appellant, and stated in his exceptions to said referee's report.

V. Time is not of the essence of the contract in question, so that non-performance on the 1st Nov. 1851, should bar this action; especially as the acts and sayings of both parties on and since that day show conclusively that they did not so regard it. (*Edgerton* v. *Peckham*, 11 *Paige*, 352. *Stevenson* v. *Maxwell*, 2 *Comst.* 408.)

VI. The parties having agreed on the 1st Nov. 1851, to suspend indefinitely the time for consummating their contract, the tender by the appellant of the balance of the purchase money and his bond and mortgage, at the house of Covert, Nov. 14th, 1851, entitled him to a deed for the premises, and a perfect title thereto.

VII. If the respondent does not perfect his title, he should be compelled to convey the property, and deduct from the purchase money a reasonable compensation for the defects in his title; (*King* v. *Bardeau*, 6 *John. Ch.* 38; *Winne* v. *Reynolds*, 6 *Paige*, 407;) or convey such part of the land as he has a perfect title to; and in case he does not make compensation for the defects of title to the residue, and convey that also, then as to such residue, there should be a reference to ascertain the appellant's damages, and a judgment that the respondent pay the same. (*Woodcock* v. *Bennet*, 1 *Cowen*, 711. *Morss* v. *Elmendorf*, 11 *Paige*, 277. *Voorhees* v. *De Meyer*, 2 *Barb. S. C. R.* 37.)

VIII. The objections raised by the appellant to the respondent's title were made not capriciously, or to avoid the contract, but in order to have the defects cured, so that he might have what the respondent had contracted to give, a perfect title. There was good ground for raising these objections, however they may be decided. There is no pretense that the respondent has lost any thing by the delay, and he should be decreed to perform his contract, unless this court shall consider it a sufficient excuse to allow him to repudiate it because the land has risen in value, when there is nothing in this case which would have prevented

him from enforcing it against the appellant if the land had depreciated to half the contract price.

N. B. Morse, for the respondent. I. The title of the defend ant was perfect. The deed from the defendant to Learned, and Learned's mortgage back for the consideration money of the deed, were, together, but one act, and formed but one contract, by which Learned took a conditional fee in the land. (*Jackson* v. *De Witt*, 6 *Cowen*, 316. *Stow* v. *Tifft*, 15 *John.* 458.) If there had been no mortgage back, from Learned, there would not, at law, have been a condition to the fee granted to Learned, but there would have been a condition in equity, called an equitable mortgage, which a court of equity would enforce. The grantees of Learned took their estates upon the same condition that Learned's was held upon. Their seisin was upon condition. The wife's right of dower is of the seisin of her husband. The seisin of the husband was of an estate upon condition, which has been forfeited to the lord, who has reentered and is now seised in his first estate. The payment or tender of the money at the day agreed upon in the mortgage—called the law day—would have cleared the estate of the condition, and the estate would have become absolute at law; but as the money was not paid or tendered, the condition became forfeited, and the title of the mortgagee became absolute at law. Courts of equity at an early day interposed to soften the rigors of the common law, and extended the law day to an indefinite period, and established an equitable estate in the mortgagor, called his equity of redemption, which existed from the day the mortgagor had a right to redeem until that right was cut off by a foreclosure. It is immaterial to the questions raised in this action to consider whether the law day has become obliterated and the equity day adopted at law, because the rule in equity does not change the nature of the estate—but only imposes a new requisite to the forfeiture of the condition; and if this requisite is adopted at law, it does not affect the case now before the court, because the effect of the foreclosure is the same as the original forfeiture by non-payment, and non-tender

at the law day. Equity always follows the law in its relations to estates in land, and the forfeiture of the condition in equity puts the estate in the same plight as the forfeiture of the condition at law puts it. Where, as in this case, the grantor conveys, and at the same time, as part of the same contract, the grantee gives back a mortgage for purchase money, the conveyance is upon condition, and the condition being forfeited whether at the law or the equity day, the grantor may enter, and "shall be seised in his first estate, which he had at the time of the estate made upon condition." I use the word grantor here as a general term, including his representatives and assigns. The grantor in the present case having been the purchaser at the mortgage sale, it is sufficient to speak of him alone. The estate granted to Learned, being upon condition, and the purchasers from him having taken title with notice, took subject to the condition, and were seised of an estate upon condition; and a woman cannot claim dower in land of which her husband was seised upon condition during coverture, in case of the forfeiture of the condition, during the lifetime of the husband. If a man seised in fee of an estate marries, and afterwards the condition is broken, and the lord enters for the breach, he will avoid the wife's dower. (1 *Rolle's Abr.* 474.) The grantees of Learned were made parties to the foreclosure, and had their day in court to redeem, and prevent forfeiture of the condition upon which they held their title, and failed to do it. The condition which had already been forfeited at law became forfeited in equity, and Van Voorhis, by his purchase at the master's sale became "seised in his first estate which he had at the time of the estate made upon condition." (*Coke Lit.* 202 *a.*) To entitle a person to redeem a mortgage, such person must have an interest in the land. (*Grant* v. *Duane*, 9 *John.* 591. *See pp.* 611, 612, *per Thompson, J.*) The wife of Hanes Learned had no such interest, nor had the wives of the purchasers from him. (*Lawrence* v. *Miller*, 2 *Comst.* 254, *per Gardiner, J. Moore* v. *New York*, 4 *Seld.* 110.)

II. If the court should be of the opinion that the title of the defendant is not a perfect title in fee, still an action for specific

performance is an application addressed to the sound discretion of the court. (*Seymour* v. *Delancy*, 3 *Cowen*, 445, *by Savage, C. J., and Suydam, senator*, *pp.* 505, 525. *St. John* v. *Benedict*, 6 *John. Ch.* 111. 12 *Ves. jun*, 331. 1 *id.* 566.) And the present is not a proper case for the exercise of such discretion. (1.) The contract on the part of the defendant was to give a full covenant warranty deed. This was the act he was to perform. (2.) He undertook and warranted that the title in the land to be conveyed by the deed should be a perfect title in fee at the time set for the delivery of the deed. There is no pretense that the representation made by the defendant in this warranty was not made in entire good faith. If at the time the deed was to have been delivered the defendant had not the title, which he had thus warranted to have, and the plaintiff was ready on his part, the warranty was broken, and the plaintiff had his action upon it, and he consequently had his adequate remedy at law. (3.) It is perfectly clear, and is nowhere pretended not to be, that the defendant was ready, and repeatedly offered to deliver the full covenant warranty deed called for by the contract, and that the plaintiff at all times refused, and in the frame of his complaint refuses to accept such a deed upon the ground that the title of the defendant was, and is, not a perfect title. If the title of the defendant is defective in the respects urged, the defects are not such as the defendant can remedy. He has no power to compel these married women to release their claims upon this land, and a court of equity will not decree an impossibility, nor will a court of equity compel him to wake up dormant claimants to his freehold, if any claims they have. It would be a new exercise of power in the court to take charge of, and direct the litigation, nay to originate a litigation which must bring into it a host of married women, to have their rights cut off, for that would be the only object. It is a well settled principle of equity, not to compel the specific performance of a contract which will result in the "injuring a third person." (1 *Sugd. Vend.* 420.) If these married women have the rights supposed, and the court compel a foreclosure of these rights, will they not be injured to the amount of the value of those rights? But the court cannot

compel a foreclosure in these cases: it can only compel those who have interests in the land *to redeem* on pain of foreclosure. The very object of the proceedings to foreclose, is to give notice to the parties *to redeem*, which if they disregard, will be followed by foreclosure of their rights to redeem. If these wives come in, and offer to redeem, the court cannot refuse their offer. They may pay the amount due and become subrogated to the rights of the mortgagee, and so take the fee of the whole tract—should the court create this episode in the litigation between the present parties, and should some of these women come in and redeem, a knot of relative rights would be created between these claimants, growing out of the order of the conveyances—the value of a married woman's right of dower, her husband living, and in various other respects to untie which would afford some scope to judicial patience if not to its ingenuity. The court will hardly compel a litigation, and if it does not, it is impossible for the defendant specifically to perform this part of his contract. (4.) A court of equity will not, at the suit of the vendee, compel a specific performance where the title of the vendor is not perfect, and will order the agreement to be canceled when the purchaser refuses to take it. (*Sugd. on Vend.* 419. *King* v. *King*, 1 *My. & K.* 442.) To compel the giving of a full covenant warranty deed, upon the plaintiff's theory, would only lay the foundation for an immediate action at law, upon the covenant of seisin, which would be broken by the delivery of the deed. Upon the plaintiff's theory, the only deed he had a right to insist upon in the execution of this contract was one so framed as not to leave the seller liable to an action on account of a flaw in the title. (1 *Sug. on Vend.* 420.)

III. The referee stands in this case in the place of one of the justices of this court at special term, and having exercised his discretion upon the case made before him, the general term will not disturb his judgment unless it be apparent and clear that the discretion has been improperly exercised.

IV. The referee should not have retained the case for the purpose of ascertaining the damages sustained by the plaintiff; because, (1.) There was no question as to the entire good faith

of the defendant, in making the agreement and the amount if any thing which the plaintiff had a right to recover. It was the amount he had paid with interest. (*Peters* v. *McKeon*, 4 *Denio*, 546.) (2.) The decision of the referee on this point was wholly and to the utmost extent in favor of the plaintiff, and the defendant has not appealed. (3.) This action cannot be turned into an action on the case for deceit. There being no pretense in the complaint or by evidence, even that the defendant did not act in entire good faith.

V. The judgment of the referee ought to be affirmed, with costs to the defendant.

EMOTT, J. One of the objections made by the plaintiff to the title of the defendant was, that the rights of dower of the wives of certain grantees of Learned, the original mortgagor of the premises contracted to be sold, had not been extinguished. This was a valid objection. Although the seisin of the grantor of the persons whose wives were omitted from the foreclosure under which title was made to Van Voorhis, was not such as to give his wife a right of dower against the mortgage which was given for purchase money; and probably by the same rule the wife of his grantee could not claim dower against the mortgage, still in the surplus, after paying the mortgage, or in the equity of redemption, as against all persons but the mortgagee for purchase money, both the wife of the first mortgagor and the wives of his grantees would be admitted to dower. I am aware that it was decided by the late Justice Barculo, in *Cunningham* v. *Knight*, (1 *Barb. S. C. R.* 399,) that when a woman married a husband who was seised of lands subject to a mortgage previously given for the purchase money, no right of dower ever attached and no suit to have her dower by redeeming all or any proper share of such a mortgage, could be maintained by the widow after the death of her husband. The learned judge placed his opinion very much on the authority of *Jackson* v. *De Witt*, (6 *Cowen*, 316,) and on the doctrine of an instantaneous or transitory seisin in the husband, in cases where the deed and the mortgage for purchase money were simultaneous and part

of the same transaction, which was asserted by the judge who delivered the opinion of the court in that case. Both these cases indeed differ from the present, in that the mortgage in each of them was executed before the marriage; but I am unable to see how that fact can affect the question or weaken the application of the reasoning of the court. If the husband, upon a conveyance to him for a consideration which he at the time executes a mortgage to secure, in whole or in part, obtains no seisin which is dowable at all, and acquires no estate out of which his wife or widow can be endowed, for the want of any actual or legal seisin until the mortgage given for the purchase money is satisfied, then evidently the rule and the result must be the same, whether the mortgage be executed during coverture or before. But we are all agreed that the doctrine of these cases is erroneous. *Jackson* v. *De Witt* was indeed correctly decided. That was ejectment for dower, by the widow against the tenant of a mortgagee, for purchase money, to whom the husband had released his equity of redemption. Obviously all that was necessary to sustain the decision of the court against the plaintiff in that case, was to hold that the mortgage was still outstanding as to the widow; and since she could not of course have dower against and in preference to the mortgage, she could not bring an action at law against the mortgagee in possession, nor claim her dower without contributing justly to the redemption of the mortgage to which it was subject. The doctrine of an instantaneous seisin was laid down in reference to, and for the benefit and protection of, the mortgagee for the purchase money when the wife did not sign the mortgage. As to him and his mortgage the husband has no seisin of which his wife can be endowed. But as to all the world beside, in this as in every other case of a mortgage, the equity of redemption is the legal estate in the land, and the mortgage is simply a security for money. As long as this is so, and the mortgage is not regarded as a reconveyance of the title and estate, dower must attach to such an equity of redemption subject to the prior rights and equities of the mortgagee. The consideration of the mortgage and the nature of the transaction so far affect the security as to render it unnecessary that

the wife should join in such a mortgage, and give it without her assent the same effect against her that it would have if it were the joint act of husband and wife, and also a preference to anterior judgments. This is the rule as declared by statute in reference to lands purchased by a husband during coverture, and mortgaged by him for the purchase money. (1 *R. S.* 740, 749.) So far as the wife or creditors are concerned, the seisin of the husband is of the equity of redemption only, and the lien of the mortgagee attaches simultaneously with the conveyance of the title, and prevents either the right of dower or the lien of judgments from operating, except upon the interest which remains after satisfying the mortgage. But it does not follow that a husband who has given a mortgage for the purchase money has such a transitory seisin that his widow cannot be endowed at all of the equity of redemption, if that mortgage remains unsatisfied in whole or in part; or that she cannot be permitted to redeem her dower interest from the mortgage. The contrary was held after full consideration, and a very able examination of the authorities, by Vice Chancellor Ruggles in *Bell* v. *The Mayor of New York*, (10 *Paige*, 49,) and his decision was affirmed by Chancellor Walworth on appeal. That case decides that the rights of the widow in the equity of redemption of a mortgage given for purchase money were not cut off by a foreclosure and sale in a suit to which she was not a party, commenced during the life of the husband, but not brought to a decree until after his death. I am unable to see upon what principle a foreclosure without making the wife a party during the life of the husband, can be more effectual than if it took place after his death. The right of the wife to dower in her husband's lands attaches at once to all lands of which he is or becomes seised at any time after marriage, and cannot be divested without her agency and consent, and it is recognized and protected while it is inchoate as distinctly as after it has become actual and immediate.

That the seisin of the husband in such a case is one of which the wife may be endowed, subject to the payment of the mortgage or to keeping down her just proportion of it, is clearly

shown and expressly decided by the chancellor and the vice chancellor in the case to which I have just referred. The doctrine of that case has met, I apprehend, with the approval of the profession and the courts; and so far as *Jackson* v. *De Witt* or *Cunningham* v. *Knight* deny the right of a widow to redeem her dower from a purchase money mortgage, either entirely outstanding or foreclosed in a suit to which she was not a party, I think they must be considered as not the law.

It seems to me that these considerations are decisive of the present question. Whether the wives of the grantees of the original mortgagor were necessary parties to a foreclosure, in order to make a perfect title, cannot depend upon whether they had or could have a dower interest against, or paramount to, the mortgage, but whether they have any interest in the lands at all. The object of a suit in equity upon a mortgage is to foreclose all parties interested in the equity of redemption; that is, to cut them off from subsequently claiming and obtaining the enjoyment of their interests, whatever they may be, by redeeming the mortgage either *pro tanto* or entirely. It may be very true that by a sale in a suit against the mortgagor alone or from which any parties in any way interested in the lands are omitted, the existing title and estate of both the mortgagor and mortgagee may become vested in a purchaser, but the interests and estates in the equity of redemption of persons who are not parties do not pass, nor are they affected by such a sale.

As to the wives of the grantees of the mortgagor in this case, it is true the purchaser at the sale under the decree, stands in the place of the mortgagee but as mortgagee only. They have a right to invoke the rule, once a mortgage always a mortgage, until their rights have been foreclosed, and they may at any time after their inchoate estate has become entire and complete, assert their equity to redeem. The rights and equities acquired under the mortgage are indeed prior and paramount to these equities, but as long as any such equities exist the plaintiff was but a mortgagee in possession as to those in whom they are or may become vested, and he cannot convey a title which is perfect and indefeasible in equity as well as at law

There is no analogy between the case of a woman who has at the time of the commencement of the suit a right of dower either actual or inchoate, and the case of a purchaser *pendente lite.* Whatever interests are acquired during the prosecution of the suit are subject to the rights of the plaintiff, and will be affected by the judgment in the cause, without naming their holders in the proceedings. But a doweress, or a wife having an inchoate right of dower when the suit was commenced and who is not made a party, is not bound to take notice of the proceedings. She is not called upon to redeem, nor does she lose her right to do so; nor is she bound to attend to her interests in a surplus arising at a sale of which she is not presumed to have had notice so as to protect herself. (1 *John. Ch. Rep.* 45. *Id.* 482. 3 *Paige*, 658.) That inchoate rights of dower are entitled to protection, and that one-third of the surplus proceeds of a sale after satisfying a mortgage paramount and prior to the wife's rights, should be secured to await the contingency of her survivorship in all cases where these rights have not been voluntarily released, was held by Justice Brown in *Denton* v. *Nanny*, (8 *Barb.* 618.) That case is in point upon the present question, except that there the mortgage was not for the purchase money but was executed by both husband and wife. The decision in that case, and the reasoning by which it is supported, were approved by the full bench of the 7th district, in *Vartie* v. *Underwood*, (18 *Barb.* 561, 564.)

Upon the whole, I think we are compelled to reach these results in this case: 1. The original mortgagor and his grantees had each of them such a seisin of the equity of redemption in these lands, that their wives would be entitled to dower in that portion conveyed to their respective husbands, subject to the payment of the mortgage made by Learned. 2. The wives of these owners of the lands could therefore in case they survived their husbands, come in and redeem the mortgage and so obtain dower. 3. Such an interest in the equity of redemption, and consequent right to redeem, cannot be barred or divested by a foreclosure or sale in a suit to which the wife is not a party, whether the right be at the time actual or inchoate. 4. The

wives of the grantees of Learned in this case were therefore necessary parties to the suit for the foreclosure of his mortgage, and the title of the vendor Van Voorhis was defective, because they had not been brought in.

But this was a defect which the vendor could not remove. He might bring a suit to foreclose them, but he could not prevent them from redeeming if they saw fit. When, therefore, he offered the purchaser all the title he had he did every thing which he was able to do legally, to perform his agreement. The plaintiff declined this title, and after a very considerable delay, which is certainly somewhat equivocal as to the intentions of the parties, he brings this suit to compel the performance of the contract according to its terms; that is, to compel the defendant to give him a title which he confessedly has not to give. There is no desire or willingness to receive the title which the vendor has or can make, either expressed in the complaint or to be found or inferred from the plaintiff's conduct. Such a suit as this a court of equity cannot entertain. When the title fails, and especially when it fails in a case where the vendor honorably supposed he had title when he made the agreement, the remedy of the vendee is a proper action for damages. It is true the vendee may offer to take the defective title with compensation for the defects, or a proper deduction from the purchase money; and if that is refused he may ask a specific performance to the extent of the vendor's ability, with such compensation or deduction. So if the defect be not known or ascertained until the vendor's title comes to be examined in a suit for specific performance, the vendee may then elect to take the title as it is, with proper compensation. But neither of these is this case. The state of the title was fully known to both parties and formed the ground of their original difference. This suit, however, is brought to compel the defendant to give a complete and perfect title, and there is no offer to take any thing less. That is something which is not in the power of the court to compel. Something which the defendant has not and cannot acquire, and therefore the referee might have dismissed the suit. His judgment

is as favorable as the plaintiff can ask, and should be affirmed with costs.

BROWN, P. J. concurred.

S. B. STRONG, J. The plaintiff demands, in this action, the specific performance of a contract for the sale of real estate to him, by the defendant. The defendant answers that he offered to perform the contract, according to its terms, but that the plaintiff declined the offer and refused to perform it on his part. And the defendant contends that after such refusal he was absolved from his engagement. The plaintiff does not deny that the defendant tendered to him a conveyance, in terms conformable to the contract, but he alleges that there were defects in the defendant's title to a portion of the premises, which could be cured by certain suggested proceedings by the defendant, and that he offered to accept, at the time, a deed for those parts to which his objections were inapplicable, and for the residue when the title should be perfected, and to adjust the payment or security of the purchase money upon equitable terms; to which offer the defendant refused to accede.

The objections raised by the plaintiff to the defendant's title were to the proceedings in a suit for the foreclosure of a mortgage to the defendant by one who had purchased from him, under which the defendant had purchased the premises. It did not appear from the papers on file, that subpœnas in that suit had been served upon all the defendants; or that final judgment had been entered against some of the parties named, and the wives of some of the purchasers of the equity of redemption had not been named as defendants. It appears from the report of the referee that these objections were, at the time, founded in fact. Some of the papers to prove the service of subpœnas had been mislaid, but they were found upwards of two years after the negotiation between the parties had terminated, and that objection was then cured. The referee also states that the defendants named in the complaint in that suit, against whom no decree had been made, were judgment credit-

ors whose liens had been satisfied, or persons who had no interest in the mortgaged premises. That was not, therefore, any valid objection to the title, but it was a seeming one, and it does not appear that any satisfactory explanation was made to the plaintiff, at the time.

The remaining objection, that the wives of some of the subsequent purchasers of parts of the premises sold in the foreclosure suit, if it ever had any force, still exists. It involves the question whether a purchaser of land, who, at the time of the conveyance to him, executes a mortgage for the consideration money, or a part of it, has a dowable estate, as against the mortgagee or those claiming under him. No doubt the deed of conveyance and the mortgage constitute but one transaction, and the whole must be taken together. But I cannot perceive how they constitute a conveyance of an estate upon condition. The grantor cannot re-enter, nor recover the land, for condition broken, nor can he avoid the liens of incumbrances, except upon a foreclosure. The mortgage to him is not a reconveyance of the title upon condition to be void upon the payment of the secured money, but it is considered by our laws as a mere security, with the advantages that it has a preference over antecedent judgments against the mortgagor, and that it is not subject to the right of dower of his wife, if he has one, as against the mortgagee and those claiming under him. Neither can I understand how the grantee, in such cases, has only an instantaneous seisin. That would be so if he immediately reconveyed the *title*. He would then have no longer seisin than if he had been used as a mere conduit in the transfer to some third person. A mortgage is considered, in England, as a conveyance of the title, and accordingly the mortgagee could maintain ejectment for the land. In this state, however, since the abolition of the right to maintain ejectment, it is deemed to be a mere security for the payment of money, and the mortgagor is considered the owner, until foreclosure. By a statute of this state, which went into operation in 1830, (1 *R. S.* 740, 1, § 5,) it is provided that where a husband shall purchase lands during coverture and shall at the same time mortgage his estate in

such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands, as against the mortgagee or those claiming under him, although she shall not have united in such mortgage, but she shall be entitled to her dower as against all other persons. If this was an abridgment of the pre-existing right of dower, it was one which the legislature had the power to make; at least as to all subsequent conveyances. The effect of it was that the estate thus conveyed and mortgaged was not dowable as to the mortgagee and those claiming under him, although it was as to all others. The statutory provision was designed, as the revisers state in their notes, to enforce the rule laid down by the supreme court in *Stow* v. *Tifft*, (15 *John.* 458,) where it was decided that the widow of a grantee who gave a mortgage for the consideration money, when he took his deed, cannot claim her dower in the premises, and in *Jackson* v. *De Witt*, (6 *Cowen*, 316,) where there was a similar decision in a case in which dower had been admeasured to the widow, and she had recovered possession in a suit at law. If any one but the widow or those claiming under her, for instance a second mortgagee, should institute an action *in rem* for the land, doubtless the wife of the mortgagor, or in case of his death, his widow, should be made a party, because as to such subsequent claimant, the estate would be subject to dower. It is true that as to subsequent claimants the wife or widow has a priority, but that is a matter between them, in which the vendor mortgagee has no concern. If he should foreclose and there should be an overplus, she might claim her interest in it, and a reference as to its distribution. So might others, such as purchasers *pendente lite*, but that does not render it necessary to make them parties. I am aware that it has been decided (in *Bell* v. *The Mayor of New York*, 10 *Paige*, 49,) that the widow of a mortgagor for the purchase money who died before foreclosure, is entitled to dower, and can redeem, notwithstanding a sale in a foreclosure suit to which she was not a party. I had a long conversation with the learned vice chancellor who first decided that case, when it was pending before him, on the principal points involved in it, in which

he stated his reasons, and enforced them with great ability; but with all my deference for his opinion, and it was very great, I differed from him then, and still differ, although he was afterwards sustained by Chancellor Walworth, another very high authority. That case went to the court for the correction of errors, but it was eventually compromised. The vice chancellor, however, says, (*p.* 55,) "a foreclosure and sale by a bill in chancery against the husband, during his lifetime and while his wife's right of dower was inchoate, would have barred her claim at law. Whether it would have cut off her equity of redemption here, is doubtful." And the chancellor says, (*p.* 67,) "what would have been the effect of an actual foreclosure and sale of the equity of redemption during the lifetime of the husband under a decree of this court to which the wife was not a party, it is not necessary to decide here." The precise point between the parties in this case was not therefore decided by either of those learned judges. But I can see no substantial difference as to the existence of a claim against the vendor mortgagee, or those claiming under him, whether it is in behalf of wife or widow. If the estate is at all subject to dower as to those having this higher equity, it seems to me that even an inchoate right cannot be defeated, except in a suit to which the claimant is a party. It seems to me that there cannot be a double interest in the wife of the grantee, as against the grantor and those claiming through him. If the title is thus qualified in the hands of the original grantee, it must remain so in those claiming under him, as he cannot grant any higher estate than his own. If I am right in this, then the objection that portions of the estate were subject to the inchoate right of dower of the wives of the present holders, is untenable. Still it could not be considered as an unreasonable one, as it is founded upon the opinions of two very able judges. It is true that if there was a mistake it was one of law, and therefore did not absolutely excuse the party making it; still the difficulty of the question involved might have some influence on the purely equitable question whether one who had been delayed in the

performance of his engagement, by it, should not be entitled to some relief.

It is apparent, from the evidence, that the plaintiff was anxious to consummate his bargain, if he could obtain an unexceptionable title. Some of the objections raised by him at the time were apparently well founded, and he had a right to have them removed before he took a conveyance. Two of them have since been explained away, and the other, although so far plausible as to indicate that it was made in good faith, is invalid. It seems to me that under such circumstances he is entitled to the performance of the contract, so far as that can be effectuated, unless something has intervened which would render such a consummation peculiarly injurious to the defendant. Nothing has been suggested, except that the property has risen in value, and that the defendant would be deprived of the advance. That furnishes no reason why he should not fulfill his engagement now, when it satisfactorily appears that he has the ability to do it.

The delay, however, has not been caused by the defendant. He was ready and willing to perform his contract at the time. He ought not to be subjected to any responsibility for the rents and profits of the property if they exceed the interest on the unpaid part of the purchase money. If they fall short of the interest he should receive the difference; and he may, at his election, have a reference to ascertain what he has received for such rents and profits, and to state a balance. The plaintiff may have a decree for a specific performance of the contract, so far as it can now be performed, on the payment of such balance, if any, and the defendant's costs. And the judgment on the report of the referee should be reversed.

The decree should be entered under the direction of one of the justices of this court.

Judgment affirmed.

[Kings General Term, October 14, 1856. *Brown, S. B. Strong* and *Emott* Justices.]

Fowler *vs.* The New York Indemnity Insurance Company.

23 143
38 258
5L 449
26a 422

A policy of insurance is *prima facie* an admission, by the insurers, of the title of the insured to the property embraced in the policy; *it seems.*

It is not necessary, therefore, for the plaintiff, in an action upon a policy, to prove his title, until it has been assailed by the evidence; nor is it necessary to allege it, in his complaint. Emott, J., dissented.

Where a complaint alleged the making of an insurance upon "*his* [the assured's] three story and attic stone building," and on "*his* water wheel" &c. "occupied by the said assured;" *Held*, that this was a sufficient averment of interest in the assured.

An allegation that a policy of insurance was "*duly* assigned" to the plaintiff, indicates that it was by a sealed instrument, and a consideration will be inferred.

THIS was an appeal from a decision made at a special term, upon demurrer to the complaint. The action was brought upon a policy of insurance issued by the defendants to Robert Caldwell. The complaint alleged that in and by a policy of insurance, duly issued by the defendants, on the 6th day of January, 1853, they, in consideration of the sum of thirty dollars, to them paid by Caldwell, did insure the said Robert Caldwell, against loss or damage by fire, to the amount of $2000, "on *his* three story and attic stone building, shingle roof, and also on *his* water wheel, and on a frame one story building attached, occupied by the said assured," &c. The complaint further alleged the destruction of the buildings by fire, and their value, and that on the 6th day of January, 1853, Caldwell, by and with the written assent and approval of the defendants, duly made and given and indorsed on the policy, "*duly* assigned and transferred" to the plaintiff, all his interest in said policy; and that the plaintiff is now, and at the time of the loss was, "the *lawful holder and owner*" of the said policy of insurance, and is the lawful holder and owner of the claim and demand arising and accruing against the defendants, on account of the loss of the property insured.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The following opinion was given by the justice on deciding the cause at the special term:

BROWN, J. "The first exception taken to the complaint in this action is, that it does not state what interest Caldwell, the plaintiff's assignor, had in the property insured, or that he had any interest. The averment of interest may be general, and under that averment the plaintiff may give in evidence any interest which he may have in the subject insured. Upon looking into the complaint, I find no formal or particular averment of interest, such as was customary under the old system of pleading. I do find, however, the charge, that the insurance was effected on his (Caldwell's) three story and attic stone building, &c., and also on his water wheel, and on a frame building, occupied by the insured as a calico and silk printing establishment. Here is a distinct and positive assertion that the subject insured was the property of Caldwell, and that his title was that of owner. The statement of his right of property is plain and concise, and such as no one can fail to understand, and this is all that the code of procedure requires in framing a complaint.

The next exception taken is the omission to "set forth a valid right or title in the plaintiff, by virtue of the assignment." In other words, that the consideration of the assignment is not set forth, and does not appear. On this point, I am referred to *De Forest* v. *Frary*, (6 *Cowen*, 151,) and, as I read the case, the only point decided was, that an order not negotiable, payable to two persons not copartners, could not be assigned so as to pass the title, by one of the payees alone. The court expressly decline to determine the question of the necessity of setting out the consideration at large in the declaration. The case of *Jessel* v. *The Williamsburgh Ins. Co.* (3 *Hill*, 88,) to which I am also referred, decides nothing more than that the assignee of a policy of insurance, with the consent of the insurers, could not, before the code, maintain an action upon it in his own name, but must prosecute it in the name of the insured. The same decision was made in *Granger* v. *The Howard Ins. Co*

(5 *Wend.* 200,) even where the act of incorporation gave the right of action in the name of the assignee, under certain contingencies, unless the declaration expressly averred that the contingencies upon which the right of action depended had actually occurred. The rule of common law which governed the court in making these decisions, has been superseded by the rule of the code, which expressly requires that actions shall be prosecuted in the name of the real party in interest.

The right of the insured to assign his interest in the policy, with the consent and approbation of the insurer, is not disputed, and I am only to determine whether under the present simple, informal and concise mode of pleading, the assignment of Caldwell to the plaintiff is sufficiently set forth in the complaint. It charges that, on the 6th day of January, 1853, the said Caldwell, with the assent and approval of the defendants, written and indorsed upon the policy, (to which reference is made,) duly assigned and transferred to the plaintiff all the right, title and interest of Caldwell, in and to the policy of insurance, and that the plaintiff is now, and at the time of the destruction of the insured property by fire was, the lawful holder and owner of the policy, and of the claim and demand arising and accruing against the defendants because of the loss and destruction of the property mentioned in the policy, and is entitled to demand and receive from the defendants the amount of such loss. I cannot be mistaken in supposing this language to charge a sufficient transfer of the policy, and of the right and interest in the loss sustained thereon, from Caldwell to the plaintiff, and that no statement or averment of the consideration which moved Caldwell to make the transfer and assignment, is at all necessary. Indeed if the provisions of the code have not overcome the necessity and utility of setting out particularly and specifically the consideration upon which the assignment of a chose in action has been effected by a third person, to one of the parties in the action, it will be difficult to say what it has accomplished.

Judgment is given for the plaintiff upon the demurrer, with leave to the defendant to withdraw and answer within twenty

days, on payment of costs, to be adjusted by the clerk, or by one of the justices of this court."

From this decision the defendants appealed.

N. J. Johnson, for the appellants. I. The complaint does not state that the assured had any interest in the property insured, at the time of effecting the insurance. His interest should have been averred. (1.) If the assured had no interest in the property insured, the policy is a wager policy, and void. (*Howard* v. *The Albany Ins. Co.* 3 *Denio*, 301. 2 *Phil. on Insurance*, 601. 2 *Comst.* 210. 1 *Selden*, 405. 1 *R. S.* 662.) (2.) That it was necessary to aver the interest of the assured in the subject insured, see *Williams* v. *The Insurance Co. of North America*, (9 *How. Pr. R.* 365.) No property or interest in the subject of insurance is stated; no fact is alleged from which the law infers any interest. The word "his," in fol. 3, is at best, merely descriptive, copying the policy, and not intended by the pleader even, as an allegation of interest, as will be seen by what follows: "and on *a* frame one story building," &c. "occupied by him." That explains satisfactorily the meaning of "his," and what the pleader intended in using that word. The buildings were *occupied* by him, hence called his; but does that set forth any insurable interest? He might have occupied as an agent; would that have given him an insurable interest?

II. There is no allegation in the complaint that Robert Caldwell, the assured, sustained any loss by reason of the fire, or that the plaintiff did; or that either of them had any interest in the subject insured, at the time of its destruction by fire. (1.) The assured must have an interest at the time of the loss, as well as when the contract is made. (3 *Denio*, 303. 20 *Barb.* 339.) (2.) It must be averred in the complaint. The reason of this rule is, that by our statute entitled "Of betting and gaming," (1 *R. S.* 662,) it is enacted, that all wagers, bets or stakes made to depend upon any lot, chance or casualty, or unknown or contingent event whatever, shall be unlawful, and all such contracts are declared void. By section 10 this is not

extended so as to prohibit or in any way affect any insurance made in good faith for the security or indemnity of the party insured. It is therefore necessary for the plaintiff to show that he comes within that exception. The defendant rests upon the general prohibition. And the plaintiff must show that the circumstances exist under which alone the contract of insurance can have validity. (9 *How. Pr. R.* 373.) (3.) The presumption of continuance of interest cannot follow in this as in most other cases, and it should have been set forth in the complaint, that, at the time of the loss, the assured or plaintiff had an interest in the subject insured. For the reason that the contract upon which he is attempting to recover is void, *unless* it is within the exception made by statute, and the plaintiff must show himself within that exception. "Where the statute declares that a deed or contract is void if made in a particular manner, or upon a specified consideration, (e. g. upon usury,) it is not necessary for the plaintiff to negative the condition; he may leave it to the defendant to set up the facts which bring it within the condition upon which, and upon which it alone is void. But where a statute makes a deed or agreement, or other act void, unless made upon a specified consideration, or under specified circumstances, the rule is reversed; the plaintiff must show that the circumstances exist under which alone it can have validity; the defendant in such cases may rest upon the general prohibition." (9 *How. Pr. R.* 373.) (4.) Where the law does not imply the right to the matter or thing affected, the title, right or interest must be stated either generally or specifically. (1 *Chitty's Pl.* 378, 9, *and* 517, 9*th Am. ed.* 1844.) In this case the law does not imply the right to the matter affected; but on the contrary, the implication is against it. (*See cases above cited, as to the presumption against validity.*) (5.) The averments in the complaint, that the proofs of loss contained the matters as therein alleged, are not to be taken as allegations that those matters are true, nor as allegations of the facts.

III. The complaint does not set forth a valid right or title in the plaintiff, by virtue of the assignment. (1.) In pleading an unsealed assignment of a chose in action the consideration

of such assignment must be set forth. It must at least state that it was for a *good and valuable consideration.* (*De Forrest* v. *Frary*, 6 *Cowen*, 151. *Prescott* v. *Hull*, 17 *John.* 292.) The complaint does not state *any* consideration for the assignment.

IV. The complaint does not state facts sufficient to show that the policy of insurance therein mentioned *is assignable.* (1.) A policy of insurance is a chose in action, and not assignable at common law, so as to pass the legal interest. (*Jessel* v. *The Williamsburgh Ins. Co.* 3 *Hill*, 88, *and cases cited. Howard* v. *Albany Ins. Co.* 3 *Denio*, 301. *Granger* v. *Howard Ins. Co.* 5 *Wend.* 200–3.) (2.) The code, although requiring that actions must be prosecuted in the name of the real party in interest, has not made any "thing in action" assignable now that was not assignable before the code. (3.) Whether there are rights under the policy, or its conditions annexed, by which it may be assigned, is not the question, but simply whether *as stated in the complaint* it is assignable. (4.) If the complaint had set forth that the charter of the company, or the laws under which it was organized and incorporated, provided for assignments of the policy, then the ratification by the company of the assignment would be good, but otherwise it avails nothing. If the assured had no right or legal power to make the assignment, then the ratification or assent of the company amounted to nothing. (*Mann* v. *The Herkimer Co. Mutual Ins. Co.* 4 *Hill*, 187–90.)

V. The allegation in the complaint, "that the plaintiff is now, and at the time of the destruction of the insured property by fire was, the lawful owner and holder of the policy, and of the claim and demand arising and accruing, &c., is a mere conclusion, and not a statement of facts.

S. W. Fullerton, for the respondent. I. The complaint sufficiently alleges that the assured had an interest in the property insured, at the time the insurance was effected. (1.) It alleges that the defendants insured Robert Caldwell "against loss or damage by fire on *his* (Caldwell's) three story and attic

stone building," &c. This is an assertion that Caldwell was the owner of the property insured. (2.) It charges that Caldwell occupied the buildings insured "as a calico and silk printing establishment." This is a sufficient averment of interest. An applicant for insurance need not disclose the nature or extent of his interest, unless inquired of by the company; and a general averment, in a complaint, of interest in the insured premises, in an action upon a policy, is all that is required; and under that general averment, the plaintiff may show what interest he had in the property insured. For instance, the plaintiff in this action, under this averment, might show that he was a vendee in possession, or was the lessee of the buildings. (1 *Wend.* 85. 1 *Sand.* 551. 2 *id.* 490.)

II. It is not necessary that the complaint should show that Caldwell had an interest in the subject insured, at the time of the fire. If he had an interest at the time the insurance was effected, it is to be presumed, in the absence of any thing appearing to the contrary, that that interest continued until the loss. The complaint does not allege, in so many words, that either Caldwell or the plaintiff sustained any loss by means of the fire, but certainly it sufficiently states the loss; therefore, if it appears that Caldwell had an insurable interest at the time of the insurance, and that a loss has been sustained, the only question can be, who is the holder and owner of the claim, or who is the real party in interest in the claim which accrued against the defendants by reason of the fire? The complaint states, that on the 6th of January, 1853, Caldwell, with the written assent and approval of the defendants, &c. assigned his right and interest in the policy to the plaintiff; that on the 7th of July, 1853, and while the contract of insurance was in full force and effect, the buildings insured were destroyed by fire; that on the 12th of July, 1853, the said Caldwell made an assignment of his property to Chauncey F. Belknap, in trust for the payment of his debts. That the proofs of loss *were accompanied by the written assent of the said Belknap, that the plaintiff might receive from the defendants the amount of the policy;* that the plaintiff is the lawful holder and owner of the

policy and claim which had accrued against the defendants because of the fire. Admitting, therefore, that an assignment before the fire, of the policy, would not of itself entitle the plaintiff to maintain the action in his name, and taking it for granted that after the fire the claim which accrued against the defendants, by reason thereof, was capable of being sold or assigned the same as any other money demand, it is contended that the foregoing allegations are sufficient to show that the plaintiff is the holder of the alleged claim, and entitled to maintain the action. He was the holder of the policy at the time of the fire, and by virtue of the assignment from Caldwell to Belknap, and Belknap's written assent that he might receive the amount of the policy from the defendants, he is entitled to recover.

III. The complaint sufficiently alleges the assignment of the policy from Caldwell to the plaintiff.

S. B. STRONG, J. I am inclined to think that a policy of insurance is prima facie an admission, by the insurers, of the title of the assured to the property insured. If so, it is not necessary for the plaintiff to prove his title until that has been assailed by evidence. It is not ordinarily necessary for the plaintiff to allege, in his complaint, any thing which he is not bound to prove in order to make out his case. Hence it was held, and I believe very generally, that an averment of interest is unnecessary in declaring on a policy of insurance. (*Nantes* v. *Thompson*, 2 *East*, 385, *Per Grose, J. Clendining* v. *Church*, 3 *Caines*, 141. *Buchanan* v. *Ocean Ins. Co.*, 6 *Cowen*, 332.) It is true that these decisions were before the passage of our statute to prevent betting or gaming, which in fact invalidates wager policies. But surely it cannot be necessary to aver, in a declaration, that a contract does not come within a prohibitory statute. That should appear on the defense. Our statute of frauds declares that certain agreements shall be void unless reduced to writing. Yet it has been frequently held that it is not necessary to aver, in the declaration, upon such a contract, that it is in writing. (1 *Chit Pl.* 237. *Elting* v. *Vanderlyn*,

4 *John.* 237.) I cannot think that the statute to prevent gaming requires that what it condemns should be in effect negatived in a complaint. If it does, however, any thing from which a negative could be inferred would be sufficient. In this case the word "his," prefixed to the designation of the property insured, and the allegation that it was occupied by the assured, contain a sufficient averment of interest. Occupancy is prima facie evidence of title, and the word "his" is very significant. Together, they may be considered as a general allegation of interest. If it is too general, that is not now a cause of demurrer. The defendant, if he was dissatisfied, should have moved to reform the complaint.

As to the objection that it is not averred that the assignment was under seal, and that therefore a valid consideration should have been stated in the complaint, it seems to me that the words duly assigned indicate that it was by a sealed instrument, and that a consideration is inferred.

As to the right of the assignee to maintain the action in his own name, since the passage of our new code there can be no doubt.

The judgment should be affirmed. The defendant should be permitted to answer, on the usual terms.

BROWN, P. J. concurred.

EMOTT, J., (dissenting.) It is well settled that the assured in a fire policy must have an interest in the property assured, at the time of the contract of insurance; otherwise the policy is a mere wager and so void by statute. (*See* 3 *Denio*, 303.) It is equally clear that the assured, and by this must be understood the original party making the contract, or any subsequent assignee if it has been transferred, must have an interest in the property insured, at the time of the loss. It may not be precisely the same interest as that held by the assured when the insurance was effected, but it must be an interest in the property, existing in all the parties with whom the contract was made or to whom it has been transferred. (*S. C. and* 2 *Comst*

216.) The contract is one of indemnity merely, and if the parties claiming its benefits have not been damnified by the injury against which it was intended as a protection, it cannot be enforced for their advantage.

In the complaint in this case there is no averment that Caldwell, who effected the insurance and assigned the policy to the present plaintiff, had any interest in the premises when the policy was made, except what may be included in or inferred from the statement, that he effected insurance on "*his*" building and on "*his*" wheel; the whole being occupied and used by him as a factory. Possibly we might hold this description sufficient on this point, but the pleading is fatally defective in another. There is no averment whatever that the plaintiff Fowler, to whom the policy is alleged to have been assigned on the 6th of January, 1853, had any interest whatever in the property at the time of the fire, which took place on the seventh of July, 1853. Indeed it may be observed that there is no allegation of any interest of Caldwell the assignor at that time. The provisions of the code as to suits in their own names by assignees of rights of action, have nothing to do with the question. The difficulty is that the complaint does not show any right of action. The party who held the policy at the time of the fire brings this suit. It was then, if ever, that a right of action accrued; but to that it is necessary that the holder of the policy should be the owner of the property. No such interest in him is shown, and therefore as to him it was a mere wager, and void by statute. If the transfer of the policy had been made after the fire, probably it could be upheld as an assignment of a sum of money due from the defendants. But that is not the case stated by this complaint. The judgment of the court below should be reversed and judgment ordered for the defendants. The plaintiff to have leave to apply at a special term to amend on proper terms.

Judgment affirmed.

[KINGS GENERAL TERM, October 14, 1856. *Brown, S. B. Strong* and *Emott* Justices.]

23 153
38 513
1h 363
46h 231
38a 168
70a 451

BROUWER and others *vs.* JONES.

B. & M. being the owners of a tract of land in the city of Brooklyn, sold and conveyed two lots to S. The deed was executed by the grantee, as well as by the grantors, and contained a covenant that neither S. nor his heirs or assigns, would establish or carry on, upon the premises conveyed, any manufactory, trade, business or calling which might be "in any wise dangerous or noxious or offensive to the neighboring inhabitants." B. & M. had previously conveyed to O. B., one of the plaintiffs, other lots in the vicinity of those so conveyed to S. and in the same tract. J. B. another of the plaintiffs was the owner of a part of the premises retained by B. & M. at the time of their conveyance to S. and subsequently conveyed by them to the person under whom J. B. derived his title. And P. the other plaintiff claimed under the deed to S. J. the defendant, being in the possession of the said two lots so conveyed to S. claiming as owner, under a title derived from S, established, and was carrying on, a business which was alleged to be among those embraced in the covenant, and to be dangerous, noxious and offensive to the plaintiffs and other neighboring inhabitants. *Held* that although the plaintiff O. B., being a previous purchaser, could not sue at law upon the covenant in the deed from B. & M. to S., he not being the assignee of that covenant, yet that the covenant was intended not only for the benefit of B. & M. but also for that of all their prior as well as subsequent grantees, and created an *easement* in behalf of the whole property; and that a court of equity might interpose, by injunction, in behalf of any of the owners of the lots, as being parties for whose benefit the covenant was made.

Held also, that the fact that P. one of the plaintiffs deduced his title through S. the defendant's grantor and the original grantee and covenantor, was wholly immaterial; title to lands within the tract for the common benefit of which the easement was created, being the only requisite to support an action to restrain a violation of the covenant by any proprietor. S. B. STRONG, J., dissented.

A life estate in a portion of the tract, obtained by the purchase of a dower interest, is sufficient to sustain such an action.

An owner of any estate, as well as an occupant of the dominant tenement, in such a case, may invoke the aid of a court of equity to enforce the easement in the servient tenement.

The covenant in the deed to S. constituted a right in the grantors and those who might claim, under them, any part of the entire tract then held by them, upon the land conveyed, whether in the hands of S. or his heirs or assigns. And the nature of the covenant clearly evinced that it was designed to run with the land, and not to create and continue a mere personal obligation. In such cases it is well settled that the covenant may be enforced by and against those who may subsequently become part owners. *Per* S. B. STRONG, J.

APPEAL by the defendant from a judgment of the city court of Brooklyn. The complaint alleged that Jacob Brouwer

and John L. Mason, on the first day of January, in the year 1839, became and were the owners in fee of a certain tract of land in the sixth ward of the city of Brooklyn, embracing the several lots thereinafter mentioned or referred to. That on the 26th day of June, 1845, the said Brouwer and Mason, by a conveyance bearing that date, which was recorded in the office of the clerk of the county of Kings on the 13th day of November, 1845, sold and conveyed in fee two of the said lots situated at the southwesterly corner of Hicks and President streets, to one Joseph Sands, who, on the 13th day of August, 1848, by a conveyance bearing that date, which was also recorded in said clerk's office on the first day of September, 1848, sold and conveyed the same in fee to one Stephen Arents. That the said Stephen Arents, on the first day of May, 1852, demised the said two lots, for a term of five years from that date, to James R. Ferris and Henry A. Jones, and the said James R. Ferris, by an instrument in writing bearing date the first day of July, 1852, assigned and transferred all his right, title and interest in the said term of years to Henry A. Jones, the defendant, who is now in the possession and occupation of the said two lots of land. That previous to the said conveyance so made to the said Joseph Sands, the said Jacob Brouwer and John L. Mason sold and conveyed other lots in the vicinity of the said two lots, and embraced in the same tract of land, to the plaintiffs herein, or to the grantors of the said plaintiffs, by conveyances which are recorded in the said office, and that the plaintiffs are now the owners of the same. That in all of the said conveyances so made by the said Jacob Brouwer and John L. Mason to the said Sands, as well as to the plaintiffs and their grantors, an express covenant was contained on the part of the respective grantees, to the effect, that at no time should there be erected, established or carried on in any manner on the premises so granted, any slaughter house, tallow chandlery, furnace, foundry, nail or other factory, or any manufactory for making starch, glue, varnish, vitriol, oil or gas, or for tanning, dressing, repairing or keeping skins, hides or leather, or any distillery, brewery or sugar bakery, lime kiln, cow stable, piggery, or any manufactory, trade, busi-

ness or calling whatever which may be in any wise dangerous, or noxious, or offensive to the neighboring inhabitants. That the defendant had notice of the said covenant when he became interested in the said two lots so demised to him, as above stated, and entered into the occupation thereof, but that he nevertheless had established upon the said lots a steam saw mill or manufactory, where he now carries on the business of sawing and planing boards and lumber, by means of machinery driven by steam, which steam is raised to a great extent by the combustion of the pine shavings and light wood detached from the said lumber in the process of sawing and planing, causing great quantities of noxious and offensive smoke, dirt and soot to arise from such combustion, which, by the action of the wind, is diffused into and upon the said premises of the plaintiffs, as well as into and upon the premises of the neighboring inhabitants, to their great danger, annoyance and discomfort, and in direct violation of the said covenant contained in the conveyances of the said Brouwer and Mason to the said Sands and to the plaintiffs. The plaintiffs therefore demanded that the defendant might be restrained and perpetually enjoined from carrying on the said business of sawing and planing boards and lumber, by means of machinery driven by steam, and from using the said two lots of land, or either of them, for any dangerous, noxious or offensive purpose, contrary to the said covenant, or for such other or further relief as the nature and circumstances of the case might require.

The defendant, by his answer, denied most of the allegations in the complaint; and stated that he had no knowledge or information sufficient to form a belief, as to whether or not, in the conveyances alleged to have been made by Brouwer and Mason to Sands, or to the plaintiffs and their grantors, or in either or any of them, there was an express or any covenant contained, on the part of the respective grantees, to the effect in the complaint stated, or otherwise, and therefore denied the truth of each and every of said allegations; and he insisted that if there were any such covenant on the part of the said Sands, it was merely a personal covenant, binding only upon the party making

the same, and that an action for the breach thereof could be maintained only by those with whom the covenant was made, and their representatives or assigns. The defendant further alleged, that he had not covenanted to the effect in the complaint stated, with the plaintiffs, or either or any of them, or with any other person or persons whomsoever; and he denied that he had notice of the covenant, in the complaint alleged, as therein stated, or otherwise. The defendant admitted that he was carrying on the business in the complaint alleged, but stated, that the sawing and planing alleged in said complaint was confined to the sawing up of boards and lumber, and afterwards planing the same, in the defendant's own business, which was that of manufacturing boxes. And he denied that great quantities of noxious or offensive smoke, or dirt, or soot arose, as stated in said complaint, which, by the action of the wind or otherwise, was diffused into and upon the premises of the plaintiffs, or into or upon the premises of the neighboring inhabitants, to their great danger, annoyance or discomfort. The defendant insisted that the said business was a lawful business, and not in violation of any covenant of the said Sands or the defendant, or of any covenant binding upon the defendant, and that the said business was not in any way noxious, offensive or injurious to the health of the neighboring inhabitants.

The jury found a special verdict, as to the plaintiffs' title and interest, and finding the facts to be substantially as stated in the complaint. They found that the manufactory of the defendant was dangerous and offensive to the plaintiffs and neighboring inhabitants, but that it was not noxious. The covenant in the conveyances from Brouwer and Mason to Sands, for a breach of which the plaintiffs claimed a right to relief against the defendant, was as follows: "And the said parties of the second part, for themselves, their heirs, executors, administrators and assigns, do hereby covenant, promise and agree, to and with the said parties of the first part, their executors, administrators and assigns, that the said parties of the second part, their heirs, executors, administrators and assigns, shall not nor shall any of them, at any time or times hereafter, erect, establish or

carry on in any manner upon the premises so granted, any slaughter house, tallow chandlery, furnace, foundry, nail or other factory, or any manufactory for making starch, glue, varnish, vitriol, oil or gas, or for tanning, dressing, repairing or keeping skins, hides or leather, or any distillery, brewery, sugar bakery, lime kiln, cow stable, piggery, or any manufactory, trade, business or calling whatever which may be in any wise dangerous or noxious or offensive to the neighboring inhabitants."

These conveyances were executed by the grantees, as well as by the grantors. The city court directed a judgment to be entered in favor of the plaintiff, upon the special verdict.

Charles Mulock, for the appellant. I. The covenant in question for the breach of which this action is brought, was not made with the plaintiffs in this cause, nor do they own any land or estate with which the covenant may be said to run; they therefore cannot prosecute for a breach of the covenant. (1.) A covenant between grantor and grantee *in fee*, like the one in question, is merely personal: no privity exists between the parties of such character as will attach the covenant to and make it run with the land. (2.) The plaintiffs had no land or estate to which such covenant attached, or with which it ran, or upon which the covenant operated in any manner. (3.) The defendants are not chargeable with the observance of the covenant, being purchasers in fee.

II. The covenant in question created no easement for the benefit of any lands now owned by the plaintiffs. (1.) If the covenant operated as imposing an easement on our lands, it could only be an easement for the benefit of other lands then owned by the covenantees, Brouwer and Mason. (2.) The complaint proceeds entirely on the idea that no such easement was created; they allege, that the plaintiffs, or the grantors, purchased of Brouwer and Mason before the covenant in question was made. (3.) Brouwer certainly could take no benefit under the easement, and as to him in any event, the complaint should be dismissed.

III. The plaintiffs will not now be allowed to amend their

complaint in the manner suggested in the court below. (1.) The legitimate office of an amendment is to conform the papers to the facts in the case of such clerical errors and the like, as instead of overthrowing the case before stated, go to confirm it and make it definite and certain, but not to allow a party to plant his right to recover on one state of facts, and at the trial allege that his right to recover depended upon the facts being exactly the reverse of what he has stated them in his complaint. (2.) He should have made his motion at the trial of the cause.

IV. The plaintiffs do not show themselves to be in the position alleged in the complaint, nor are they entitled to maintain the action in question. (1.) The complaint alleges that they are joint owners or tenants in common; this is not proved, for they owned in severalty so far as they do own. (2.) They had not been injuriously affected when the action was brought; the damage was only in anticipation. (3.) The action being founded on the covenant made for the benefit of many persons, as is alleged, must be brought by the plaintiffs in behalf of themselves and all others similarly situated.

V. The plaintiffs fail to show a several title in themselves of such character as is required to maintain the action. (1.) Bushnell's title not only came from Brouwer and Mason *before* ours, but there is a total failure in connecting Bushnell with Brouwer and Mason, arising from the fact that the title is traced to Luke Barker, and we have it no further. (2.) Philbrick claims under Sands, who made the covenant; Sands, when he made the covenant, if he bound any thing, only bound the lands to Brouwer and Mason; he did not pretend, when he sold, to create any easements to or for the benefit of his grantors. (3.) The verdict of the jury was clearly against evidence and should have been set aside, and the court below erred in not doing so

John N. Taylor, for the plaintiffs. I. This covenant creates an easement, intended for the mutual benefit and protection of all the purchasers of lots in the tract of land originally held by Brouwer & Mason; and any one of the purchasers, his assigns or tenant, is entitled to be protected by an injunction, against

any other who carries on an *offensive business* upon any part of the premises. (*Hills* v. *Miller*, 3 *Paige*, 254. *Barrow* v. *Richards*, 8 *id.* 351. *Trustees of Watertown* v. *Cowen*, 4 *id* 510.)

II. It is a covenant running with the land, and the easement thereby created follows the estate into the hands of every assignee. The rights attached to the several portions of the dominant tenement, are assigned to the plaintiffs; while the obligations imposed upon that part of the servient tenement which is in the possession of the defendant, rest upon him, the same as if he had personally executed the covenant. (*Hills* v. *Miller*, *supra*. *Barrow* v. *Richards*, *supra*. *Trustees &c.* v. *Cowen*, *supra*. *Norman* v. *Wells*, 17 *Wend.* 136. *Spencer's case*, 5 *Co.* 16. *Mayor of Congleton* v. *Pattison*, 10 *East*, 130. *Demarest* v. *Willard*, 8 *Cowen*, 206.)

III. By the verdict it appears that Sands, a grantor of the defendant, purchased previously to the grants made to the plaintiffs; and the court gave the plaintiffs liberty to amend in this respect. But if his grant had been subsequent to theirs, they would still be entitled to protection against the annoyance complained of, on the ground of a nuisance. (*Barrow* v. *Richards* *supra*. *Trustees &c.* v. *Cowen*, *supra*. *Mayor of London* v *Bolt*, 5 *Ves.* 129. *Att'y Gen.* v. *Blount*, 4 *Hawk.* 384.)

IV. To maintain this action, it is not necessary that the plaintiffs should reside upon the premises, or that the lots be built upon; it is enough that the nuisance complained of is calculated to diminish the value of the plaintiffs' property, by preventing good tenants from occupying it, or by depreciating its value for building purposes. (*Peck* v. *Elder*, 3 *Sand.* 126. *Barrow* v. *Richards*, 8 *Paige*, 351.)

V. The plaintiffs having a common right—the injury complained of being common to all—they may join in bringing this action, although they may not be joint covenantees. (*Trustees of Watertown* v. *Cowen*, *supra*. *Bleeker* v. *Bingham*, 3 *Paige*, 246.)

EMOTT, J. From several things about this case, and especially from the fact that a question of this importance to the community as well as to the parties, has been submitted to us upon brief written arguments, and we are thus asked to overrule a well considered judgment of the late Chancellor Walworth, affirming the decision of Vice Chancellor McCoun, I am led to infer that this appeal is brought for the purpose of enabling the defendant to remove the case to the court of appeals, and that the only importance attached to the judgment of this court is its necessity as a step in the progress which the appellant intends to make. I have therefore hesitated whether we ought not to content ourselves with pronouncing a judgment, without assigning any reasons for it. But perhaps it is due to the principles involved in the cause that they should receive a brief examination.

It may be conceded that no action at law could be maintained by the plaintiff against either the defendant or his grantors. Not because the burden of this covenant does not run with the land and rest upon all subsequent grantees, for I am inclined to think it does. The difficulty in the way of such a remedy by these plaintiffs is that if their deed or that of their original grantors, the first conveyance by Brouwer & Mason of the lots now owned by the plaintiffs, was prior to the first deed by these original owners to Sands, the defendant's grantor, as seems to be the case, then these plaintiffs cannot be said to be assignees of the covenant in question which is contained in this subsequent deed by Brouwer & Mason to Sands. But the jurisdiction of courts of equity in these cases is not confined by the limits, nor is it founded upon the principles, of the action of covenant in courts of law.

In *Bleeker* v. *Bingham*, (3 *Paige*, 246,) it was held that a court of equity can interfere and compel a full and effective execution of a covenant, although contained in an instrument between third parties, and to which the person for whose benefit it is made is not a party. In *Hills* v. *Miller*, (*Id.* 254,) Chancellor Walworth determined that a covenant or agreement by the grantors of lands with their grantee, then the owner of adjacent lots, not to build on a certain piece of ground, should be

enforced by injunction in favor of a subsequent purchaser of these adjacent lands, and that notwithstanding the grantors with whom the agreement or covenant was made had released it to the purchasers. This decision was placed on the reasonable and intelligent ground that the agreement created in the lands of which the use was thus restrained, an easement for the benefit of, and which vested in, these adjoining lots from the time of their sale with notice of this agreement; and that this was an estate with which the grantor of the two parcels could not interfere.

This principle was again asserted and acted upon in the case of the *Trustees of Watertown* v. *Cowen*, (4 *Paige*, 510, 514;) and in *Barrow* v. *Richard*, (8 *id.* 351,) the true character and extent of the jurisdiction was declared, and the principle of acting upon the lands of a covenantor as a servient tenement, to restrain the violation of a covenant against nuisances, in favor of the owners of adjacent lands, as the owners by virtue of this covenant, of an easement in these lands, distinctly laid down. I am unable to distinguish that case from the present. There the title of the plaintiffs was derived, as it is claimed to be here, through a deed prior to that by which the defendants took title. The objection was made that the plaintiffs did not stand in the position of assignees of the covenant and could not sue at law for its breach, and therefore ought not to be allowed to come into a court of equity. But the objection was met distinctly, and the point noticed, that the deed in which the covenant was contained was made after the plaintiff's title had passed out of the covenantee. The covenant in that case was substantially and almost literally like that in the deed from Brouwer & Mason to Sands, in this case. In this case, as well as in that, the grantee was bound not to occupy the premises in any manner offensive to the neighboring inhabitants. This feature of the covenant was insisted upon by the chancellor, as showing that the covenants in the deeds of the lots were intended for the benefit of all the adjacent property, whether still held or previously conveyed by the grantor. And he says that although the complainant could not sue on the covenant at law in his own name, and could perhaps only recover

nominal damages in the name of the grantor, yet a court of equity could give full effect to the covenant by a suit in the name of the party for whose protection the covenant was intended.

The object of the covenants inserted in the deeds of all the lots included in the tract of which the lots both of the plaintiffs and defendants are a part, was to protect the whole tract and every lot belonging to it, whether in the hands of the original owners or of any subsequent grantees, from nuisances or offensive and injurious erections or occupations. Every conveyance from Brouwer & Mason contained such a covenant, and every lot conveyed by them had an easement in every other lot to forbid or restrain its use or occupation in any offensive way. And therefore I am unable to see in what respect the relative dates of the conveyances to the grantees of Brouwer & Mason can make any difference. Every such covenant, in every deed given by them, was intended not only for their benefit but also for that of all their prior as well as subsequent grantees, and created this easement in behalf of the whole property. This court may therefore very properly be asked to interpose in behalf of any of the owners of the lots, as being parties for whose benefit the covenants were made. The reasoning and the conclusions of Vice Chancellor McCoun and Chancellor Walworth, in the case of *Barrow* v. *Richards*, are perfectly satisfactory to me. I cannot distinguish the present case from that, taking the most favorable view of the facts here for the defendant. And I am not at all disposed to overrule so wise, well considered and beneficial a principle of equity as that which is asserted in these and similar cases in the courts of this country.

It is claimed by the defendant that some of the plaintiffs have not shown a title to their lots which will uphold their claims in this suit. One of the plaintiffs deduces his title through Sands, the defendant's grantor, and the original covenantor in the covenant in question. I think this is wholly immaterial. Title to lands within the tract for the common benefit of which this easement was created is the only requisite, as I view this case, to support such an action as this to restrain any violation of this covenant by any proprietor. It is also said that others of the

plaintiffs fail in making out a perfect title in fee to certain lots, in not proving that certain executors under whose deed they claim had a power to sell their testator's lands. Even if this were so, and this particular plaintiff failed to show any title, it would not be cause for reversing this judgment in toto and dismissing the complaint. As to that plaintiff it might be proper to dismiss the suit, but the relief sought against the defendant is precisely the same in nature and extent, whether it be sought by one or twenty owners of these lands, and will alike enure to the benefit of all if granted in any case or at any instance. This objection would therefore only raise a question of costs, and this is not a case where a plaintiff should be punished with costs upon such an objection.

But Brouwer, the plaintiff referred to, is seised of a life estate in one third of certain of these lots by his purchase of a dower estate, and this is sufficient to sustain this action, admitting his title in fee not to be made out. Any owner of any estate, as well as any occupant of the dominant tenement, in such a case, may invoke the aid of the court to enforce this easement in the servient tenement.

These are the only objections requiring notice, and these are manifestly insufficient. The judgment should be affirmed with costs.

Brown, P. J., concurred.

S. B. Strong, J. The covenant in the deed to Sands, (under whom the defendant claims,) that neither the grantee nor his heirs or assigns would establish or carry on upon the premises conveyed, any manufactory, trade, business or calling whatever, which might be in any wise dangerous or noxious or offensive to the neighboring inhabitants, constituted a right in the grantors and those who might claim, under them, any part of the entire tract then held by them, upon the land conveyed, whether in the hands of the original grantee or his heirs or assigns. It is immaterial whether it is denominated an easement, a servitude, a privilege or a restriction. The nature of

the covenant clearly evinced that it was designed to run with the land, and not to create and continue a mere personal obligation. In such cases it is well settled that it may be enforced by and against those who may subsequently become part owners. The expression "neighboring inhabitants" would clearly include all who might reside upon any part of the premises retained at the time of the conveyance, by the grantor, as the entire tract was in one vicinity; and if it would comprehend others, that would be mere surplusage, which would not vitiate the right.

The plaintiff Brouwer being the owner of a part of the premises retained at the time by the grantors, and subsequently conveyed by them to the person under whom he derived his title, has a right to maintain an action for the breach of the covenant in the deed to Sands. The plaintiff Bushnell claims under a deed from the same grantors, but of a prior date. It does not appear positively when it was executed, acknowledged or delivered, nor whether it had a subscribing witness, but it was recorded simultaneously with the conveyance to Sands. The learned judge before whom this action was tried, seems to infer that the two deeds were executed about the same time; and he refers to the case of *Elsey* v. *Metcalf*, (1 *Denio*, 326,) altering the old rule that the date of a deed is *prima facie* evidence of the time of its delivery. That was limited to cases where the deed had not been acknowledged, or proved, and had no subscribing witness. It cannot be inferred in this case, simply from the late day when the deed was recorded, that it was not acknowledged or witnessed at the time of its date. The proof that Brouwer was entitled to the benefit of the covenant in the deed to Sands, should have been adduced by him, as he held the affirmative, and was bound to establish his right. The date of the deed must, in the absence of any proof as to whether its execution was acknowledged or there was a subscribing witness, as against any one claiming under it, be deemed to be the time when it was delivered. Brouwer has not established any right to the privilege secured by the covenant.

Philbrick, the other plaintiff, claims title under the deed to

Sands. Both he and the defendant are subsequent grantees of the covenantor. In the conveyances to them, or under which they claim, there is no similar covenant as against either. The covenant from Sands did not create a public easement, nor a right which could vest in any one except the covenantees and those claiming, under them, any part of the portion of the tract then retained by them. Consequently Philbrick had no right of action under that covenant.

The judge, however, supposes that the three plaintiffs have a right of action on the ground that the operations of the defendant create a public nuisance peculiarly injurious to them. But the complaint does not allege any nuisance; and if it might be amended so as to embrace a charge of that kind, still the special verdict, upon which alone we can act, would not sustain the charge. The jury find, and I think that the evidence authorized them to find, that the business carried on by the defendants was dangerous and offensive, but not noxious to the plaintiffs and the neighboring inhabitants. Now the combustion of pine shavings and light wood might cause great quantities of offensive smoke, and the fire might be dangerous, so as to cause a violation of rights of the plaintiffs, some or one of them, without creating an absolute nuisance. At any rate we cannot adjudge that the defendant has been guilty of so grave an offense as the creation of a nuisance, until it has been directly charged in the complaint, and the charge has been found to be true, by the jury, and especially when the jury has found that the defendant's business, in the manner in which it was conducted, was not noxious to the plaintiffs and their neighbors.

The code permits a judgment in favor of either plaintiff, where his rights are capable of a severance. They are clearly so in this instance. The judgment should be reversed, as far as it relates to the plaintiffs Bushnell and Philbrick, and modified as to the plaintiff Brouwer so as to make the injunction applicable to his interests alone.

Judgment affirmed.

[Kings General Term, October 14, 1856. *Brown, S. B. Strong* and *Emott* Justices.]

23 166
5L 146
12h 188
43h 114

THE PEOPLE, *ex rel.* Dan Marvin and others, *vs.* THE CITY OF BROOKLYN AND THE MAYOR OF SAID CITY.

Under the section of the charter of the city of Brooklyn which provides that the expenses in the construction of sewers shall be assessed and be a lien upon the property to be benefited thereby, in proportion to the amount of the benefit, the jurisdiction conferred is limited to the property to be benefited. When it becomes a question of fact whether a proposed improvement will be advantageous to the property in any designated direction, the decision of the corporate authorities is conclusive.

But there must be a question—something to decide—where the district is not clearly included. If it is entirely clear that any portion of a proposed district cannot be benefited, an attempt to render the property in it liable to pay a part of the expenses, may be defeated, if not before the corporate authorities, certainly before a judicial tribunal having the power to annul or correct the proceeding.

Where a portion of the property assessed for the construction of a sewer is so situated that it will not be benefited by the sewer, and there is no connection by sewer between such property and the projected sewer, and there cannot be any, by reason of the existence of a rail road tunnel in one of the intervening streets, such property is beyond the limits of rightful assessment, and its owners cannot be called upon to contribute towards the improvement.

THIS was a common law certiorari, to review the proceedings and assessments for a sewer in Warren street, Brooklyn, from Court street to the East river. It appears from the return to the certiorari that commissioners were appointed to apportion and assess the expense of constructing the sewer, and that they proceeded to make an assessment and give the notices required by law to parties interested. That various objections were made to the report and assessments, by the relators and other parties. That notwithstanding the objections, the commissioners completed and signed their report, and presented it to the common council for confirmation, who referred it, pursuant to law, to the assessment committeee, composed of five aldermen. That the said assessment committee considered the objections, and heard the testimony offered by the objectors. *William Beard*, a witness on the part of the objectors, testified as follows: "I was one of the contractors that built the tunnel for the rail road through Atlantic street; as that tunnel is now constructed a sewer cannot be built along Court street, from

Joralemon street, so as to connect with the Warren street sewer; there is not more than 2 or 3 feet in depth between the top of the tunnel, at the corner of Atlantic and Court streets and the pavement of the street; before I commenced excavating for that tunnel, the water along the west side of Court street flowed from Joralemon street south, to the north side of Atlantic street, and then along the north side of Atlantic street to its intersection with Smith street, according to the best of my recollection; I carried the water across Atlantic street so that it should not interfere with the construction of the tunnel; I did not get permission of the common council to change the grade in that way; I did not ask any; when I finished the work I did not restore the grade, because the street was already paved, and I did know who would pay me; if the grade had not been changed by me the water would have flowed along Atlantic street easterly to Smith street; I changed the grade as a temporary matter for my own accommodation, to prevent the water from interfering with my works east of Court street, and wash ing it away; I left the gutter as I made it when my work was done; I was the original contractor who graded and paved Atlantic street when it was first graded and paved, and knew how the water ran; I finished Atlantic street before Court street was graded and paved; I finished the whole works by July, 1836; I coped Court street in April, 1836." The committee made two reports; a majority report, and a minority report. The latter was as follows: "The minority of the assessment committee to whom was referred the annexed report of commissioners appointed to apportion and assess the expenses of Warren street sewer from Court street to the East river, report: that they have examined the same, and believe all the pro ceedings to have been regular; and, as objections have been made by parties interested therein, the committee caused due notice to be published in the corporation newspapers for five days successively, to the parties interested, of the time and place when and where they would meet to hear them on the objections and report. The objecting parties whose objections in writing are hereto annexed, appeared before the committee, and

also other parties who made verbal objections to the report Other parties interested appeared in favor of the confirmation of the report. The testimony before the committee was taken under oath, which is hereto annexed, and one or more of the committee explained, when necessary, their report.

The first point of objection proved before the committee was on behalf of the objecting parties, whose property assessed lies north of the center line of Atlantic street. It appears by testimony offered before the committee, and by an examination of the profile maps of Atlantic street and Court street, that previous to the construction of the rail road tunnel in Atlantic street, the surface water on both sides of Court street north of Atlantic street flowed along the gutter from Joralemon street southward; and that on the westerly side of Court street, when it reached the north line of Atlantic street, crossed over the gutter on that side and flowed easterly to Smith street. Had this grade, thus established by the city, continued unchanged, no part of the surface water from north of Atlantic street would have flowed into Warren street sewer, and consequently, on the principle of assessment established by the commissioners the property of the objectors would not have been liable to assessment. But it also appeared in evidence, that during the construction of the tunnel, the contractor of the rail road altered the gutter on the west side of Court street, so that the water should flow across Atlantic street southward along the gutter to Warren street. This was done so that the water should not interfere with the tunnel while in process of construction. No other permission of the common council for thus directing the water was granted than is embraced in the general consent for the construction of the tunnel. No consent of the common council was asked before the diversion, as it was intended to be temporary until the work was completed. The contractor states that when he finished the work he did not restore the grade, because the street was already paved, and he did not know who would pay him. The resolution of the common council granting the Long Island Rail Road Company permission to excavate and construct a tunnel, was passed March

29, 1844, and provided that the work should be subject to the supervision of this Board, and that at the completion of the tunnel, all cross-streets should be left free and clear, and all pavements removed or streets and their appendages injured in the construction of said tunnel, should be restored and placed in as good condition as they were before the commencement of the work; and to be subject to such ordinances as may be adopted by this board in relation to the same. As the gutters are appendages to streets, it will thus be seen that their restoration was fully provided for. On the 6th of March, 1845, this common council passed an ordinance, which is found on page 117 of the printed ordinances, providing that the rail road company should complete the tunnel, and replace, repair and re-set, in a good and workmanlike manner, and upon a proper grade or line, the curb and gutter stones, pavements, flagging and other materials removed or injured by said company or their contractors, agents or servants, by occasion or in construction of said tunnel, on or before the 15th day of April then next, under a penalty of one hundred dollars for each day's neglect. It will thus be seen that the continuance of the gutter across Atlantic street is contrary to the city ordinance, and it is in the power of the common council at any time, on its own motion, or on petition of the inhabitants living south of Atlantic street, to restore the gutter as it formerly was, across Court street. Such being the case, the commissioners have erred in applying their principle of assessment to the district lying north of Atlantic street. Before the payment of the assessment, the gutter in question may be restored, and then a district would be assessed which in no way would use the sewer. This is not a mere matter of discretion, which the common council may adopt or not. It is a matter of imperative law, which we are bound to observe.

The supreme court, in the case of *Le Roy* v. *Mayor &c. of New York*, (20 *John.* 430,) in reference to the principle of assessments of this kind, decided as follows: "Who are to be comprehended in assessments depends upon the principle on which it is made; that must be determined by a sound con-

struction of the law applied to the facts. It does not rest in the discretion of those who are to execute the law. The superintending power of this court is competent to establish the principle and compel the inferior authority to be governed by it, leaving to its discretion the manner of levying and the amount of contribution to be exacted from each individual." The same court, in the case of *The People, ex rel. Post*, v. *City of Brooklyn*, in the matter of the sewer in DeKalb avenue and Raymond street, (6 *Barb.* 209,) set aside the orignal assessment. One of the grounds of objection was, that the common council themselves had diverted the water from its natural flow, along Myrtle and Park avenues, to the Wallabout bay, so as to take it to the Raymond street sewer.

We have, therefore, arrived at the conclusion, that the property north of the center of Atlantic street is not legally within the district of assessment, upon any principle that has heretofore been established, and that to confirm the report in its present shape will lead to litigation before the legal tribunals, which, in all probabilty, will result in setting the assessment aside, and lead to delay in the collection of moneys due to the contractors. While the power of the common council is ample enough to correct the report and assessment, yet, as we disapprove of the principle upon which the commissioners acted in the assessment, we recommend the recommitment of the report to them. We think the time has come when the principle of assessment upon a large district, on account of its surface drawings, for a sewer which is of local benefit only, should be changed. In this case, from 66 to 70 per cent of the expense only is assessed upon the property really benefited by the improvement, while the remaining expense is assessed upon property which can in no way be benefited, and which will ultimately be obliged to bear all the expense of any future sewer, which the adoption of any plan for the ample supply of this city with water will render necessary, in every street occupied by buildings. We therefore recommend the adoption of the following resolution: Resolved, that the report and assessment in the matter of the Warren street sewer be sent back to the commissioners, with instructions to

correct the same by leaving out of the district of assessments all the property lying north of the center line of Atlantic street, and to make such other corrections as they may deem just and proper."

The resolutions reported by a majority of the committee were passed by the common council, and the assessment was con firmed.

The relators were owners of lots and property included in the assessment district situate to the north of the center of Atlantic street, and between Court and Clinton streets, upon which part of the district the sum of $2196.68 has been assessed, and they objected to the assessment for the reasons stated below.

Marvin & Prime, for the relators. I. By the charter of the City of Brooklyn, and the statutes in force when this assessment was made, power is given to the common council to cause sewers to be constructed, and the expenses to be assessed and be a lien on the property benefited thereby, in proportion to the amount of the said benefit. (*Brooklyn City Charter of* 1850, *tit.* 4, §§ 1 *and* 24.) The jurisdiction, then, of the commissioners to include any parcel or tract within the assessment district, and to assess it, would depend on whether that tract or parcel was to be benefited by the proposed improvement.

II. This question as to whether any particular lot is to be benefited by the sewer, is a jurisdictional question; and where it does not appear by the return that any particular lot is to be benefited by the sewer, and much more, where it appears that any lot is not to be benefited, there would be no jurisdiction to lay an assessment upon such lot, and the assessment, if laid, would be illegal and void.

III. The court will examine the evidence returned, so far as relates to jurisdictional facts, in order to determine whether the court below ever acquired jurisdiction to render the judgment complained of; and where it appears that either the whole proceeding in the inferior tribunal is void for want of jurisdiction, or where the facts and evidence are wanting to sustain any part of the proceedings or judgment, the court will adjudge such part

to be void in law. Thus in the present case, if lots have been assessed for this improvement which are not benefited by it, such assessments are void; and the court will examine the evidence to see whether it appears that any assessments have been made upon lots not benefited.

IV. The question what lots are to be assessed for the sewer, is not one of discretion, or of judgment or opinion, in the commissioners, but depends upon a sound construction of the law as applied to the facts. The only discretion given to the commissioners is, to fix the amounts of the assessments upon the particular lots, after the limits of the assessment district are determined. (*See Brooklyn Charter of* 1850, *as above cited. LeRoy* v. *The Mayor &c.* 20 *John.* 430. *Bouton* v. *President &c. of Brooklyn*, 2 *Wend.* 395. *Baldwin* v. *Calkins*, 10 *id.* 167. *Soady* v. *Wilson*, 4 *Nev. & Man.* 777. *S. C.* 3 *Ad. & Ellis*, 248. *Rex* v. *Tower Hamlets Comm'rs of Sewers*, 4 *M. & R.* 365. *S. C.* 9 *B. & C.* 547. *Stafford* v. *Hamson*, 5 *Moore*, 608. *S. C.* 2 *B. & B.* 691. *Tracy* v. *Taylor*, 3 *Gale & D.* 14. *S. C.* 14 *Jurist*, 170. *St. Catherine's Dock Co.* v. *Higgs*, 9 *id.* 1030. *Same case in error*, 11 *id.* 991. *The People* v. *Overseers of Poor of Ontario*, 15 *Barb. Rep.* 286. *People* v. *Goodwin*, 1 *Selden*, 568.)

V. None of the property situate to the north of Atlantic street is or can be benefited by the proposed sewer, and the commissioners had no right to include it within the assessment district. It is situate half a mile from the proposed sewer, and the intervention of the rail road tunnel through Atlantic street, entirely prevents any sewer being made through Court or Clinton streets which shall connect with the Warren street sewer.

VI. Nor can it be said that the sewer in Warren street can be any benefit to this district north of Atlantic street for the purpose of carrying away the surface water, for it appears from Mr. Baird's evidence, and by an examination of the profile maps of Atlantic and Court streets, that previous to the construction of the rail road tunnel in Atlantic street, the surface water on both sides of Court and Clinton streets north of Atlantic street, flowed south to the north side of Atlantic street, and then in an

easterly direction to Smith street, so that no part of it could have reached the proposed sewer; that the diversion of the water by Mr. Baird across Atlantic street, while he was building the rail road tunnel, was merely temporary, during the construction of that work, and without permission or authority of the common council; that it was the duty of the rail road company to have restored the streets to their former condition, and that the continuance of the gutter across Atlantic street is contrary to the city ordinances, and that the common council or the inhabitants south of Atlantic street can at any time restore the gutter across Court street. (*City Ordin. of Brooklyn*, 1850, *p.* 117.) It may happen that before the payment of the assessment, the gutter in question may be restored, and then a district would be assessed which in no way would use the sewer.

VII. The proceedings and assessment should be quashed, at least so far as relates to the district north of the center of Atlantic street.

N. F. Waring, for the defendants. I. The defendants had, by the terms and conditions of their charter, jurisdiction. (*See title* 4 *of Charter, sec.* 1. *Laws of* 1854, *p.* 860.)

II. The record shows that the proceedings were regular and in conformity to the charter.

III. The only question to be discussed on a common law certiorari is the question of jurisdiction.

IV. The certificates of the street commissioner and attorney are conclusive evidence as to the regularity of the proceedings. (*See tit.* 5, *sec.* 10 *of the Charter. Laws of* 1854, *p.* 874.)

V. The respondents are entitled to judgment against the relators.

By the Court, S. B. Strong, J. This being a common law certiorari, we can review only the questions of jurisdiction, and whether the proceedings have been conformable to the statute.

It is objected that the assessment upon the property of the relators, and of others, lying northeasterly of Atlantic street, was extra territorial, and so far transcended the jurisdiction con-

ferred by the statute upon the corporation, in such cases. The statute provides "that the expenses in the construction of sewers shall be assessed and be a lien upon the property to be benefited thereby, in proportion to the amount of the benefit." The jurisdiction conferred is limited to the property to be benefited. When it becomes a question of fact whether the proposed improvement will be advantageous to the property in any designated direction, the decision of the corporate authorities is conclusive. But then there must be a question—something to decide. I mean of course where the district is not clearly included. If it is entirely clear that any portion of a proposed district cannot be benefited, then an attempt to render the property in it liable to pay a part of the expenses should and would fail; if not before the corporate authorities, certainly before a judicial tribunal having the power to annul or correct the proceeding. Otherwise the statutory authority might be exercised in such a manner as to effectuate great and irrelievable oppression. The principle is well stated in the case cited by the minority of the committee of the common council. (*Le Roy* v. *The Mayor &c. of New York*, 20 *John.* 430.) The court there says, "who are to be comprehended in an assessment depends upon the principle on which it is made: that must be determined by a sound construction of the law applied to the facts. It does not rest in the discretion of those who are to execute the law. The superintending power of this court is competent to establish the principle and compel the inferior authority to be governed by it, leaving to its discretion the manner of levying and the amount of contribution to be exacted from each individual."

The facts in this case, or such of them as are necessary for its decision, do not seem to be disputed. There is not any connection by sewer between the lots on the northeasterly side of Atlantic street and the projected sewer through Warren street. There cannot hereafter be any, so long as the tunnel constructed by the Long Island Rail Road Company shall remain. That appears to be a permanent structure, and there is no probability of its discontinuance. Previous to the construction of the tunnel, the waters from the lots in question passed off on the same

side of Atlantic street. They did not flow through Warren street at all. It is clear that if there had been no change in this particular the relators' property could not have been benefited by the proposed sewer. It could not have carried off any of their redundant or deleterious fluids, or any that would have been injurious to them, except possibly by a general contamination of the air of the city, which would have been too remote to be taken into consideration.

When, however, the tunnel was constructed, the contractors, in order to build it with the greater facility, carried the waters which would have flowed on the northeasterly side of Atlantic street, by a change of the grade, across the street, so that they have since passed off through Warren street. One of those contractors testified that they changed the grade as a temporary measure for their own accommodation, and that he had left the gutter still leading the water across the street because he did not know who was to pay him for the requisite work if he should restore that part of the street to its pristine condition. It would seem, however, that such restoration would be facile, and that the continuation of the gutter is unnecessary. Under such circumstances it is the right of the relators and their associates to have the waters flow from their property in their former and natural channel, and it would seem to be doing them a double wrong, first to divert the waters (certainly unnecessarily after a short interval) and then to impose a burthen upon them which but for such diversion, would have been wholly unnecessary. Besides, the improvement in Warren street and its vicinity cannot be fully carried out, as to the relators, as they can have no connecting sewer; and if they should hereafter require a sewer for the benefit of their property they could not call for a contribution from the property holders on the other side of the street. That, of itself, probably might not be a reason for wholly exonerating them from a contribution if their existing connection resulted from the original territorial structure. But as it did not, and as, in the event of a restoration, which is probable, and which they have a right to require, they would derive no possible benefit from the projected work. they ought not to be called

upon for a contribution towards its construction. Their property is beyond the limits of rightful assessment.

The proceedings of the corporation, so far as they relate to the objectionable portion of the district, should be set aside.

[Kings General Term, October 14, 1856. *Brown, S. B. Strong* and *Emott*, Justices.]

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23 176
48 606
35h 12
42h 181
114a 187

Horton *vs.* Garrison and Hoffman.

The trustees of a school district are a *quasi* corporation, possessing power in certain cases, and for certain purposes, to bind their district and create a corporate liability which will attach to their successors in their official capacity.

They therefore have the power to bind the district, by giving a promissory note signed by them as trustees, to a teacher, for wages earned by him as such, in the employment of the district.

And where a note thus made, expresses on its face that it is given on account of the wages of the payee, as teacher in the school district of which the makers of the note are trustees, this is a description of the consideration, which the payee, by accepting the note, admits to be true. The makers, therefore, cannot be held personally liable upon the note.

The rule that when an authority is to be exercised by several officers, they must all concur in its exercise, or all meet and consult and a majority agree to the act, is subject to the qualification that if one is notified to attend, and refuses it is the same as if he had attended and dissented to the act of the majority

THIS was an action brought to recover the amount due on an instrument in writing, in the words and figures following:

"Sixty days after date, we promise to pay Joshua J. Horton, or order, sixty-six dollars and twenty-eight cents for value received, for and on account of his wages, as teacher in school district No. 4, for teaching up to this date.

August 21, 1849. John Garrison, William Hoffman, } Trustees."

The defendant Hoffman put in no answer; the defendant Garrison answered the complaint. The action was, by consent, duly referred to Hon. Thomas McKissock, as sole referee, to hear and

determine the same, who reported that the defendants made the instrument in writing or promissory note described in the complaint; that it was signed by the defendants with the affix "trustees," opposite their names; that it was given to the plaintiff for his wages as a teacher of district No. 4, of which district the defendants were, at the time of giving the note, and at the time of earning such wages, two of the trustees; and he found that the other trustee was notified of the meeting at which said note was given, and did not attend; and that the defendant John Garrison, after the note became due, made two payments thereon, and that one of them was made after he ceased to be a trustee; and that at the time this action was brought, neither of the defendants was trustee of said district. The referee further reported that there was no evidence before him whether the defendants had or had not authority to give said note for the district. And he found there was due, from the defendants to the plaintiff, on the said note, the sum of sixty-six dollars and seventy-three cents, for which sum he ordered judgment, with costs. Judgment being entered accordingly, the defendants excepted and appealed therefrom.

J. H. Ferris, for the appellants.

S. W. Fullerton, for the respondent.

Emott, J. It is well settled that when individuals acting as agents, trustees or other proper representatives of a corporation, execute a note or other contract in behalf of the corporation, as a note for the payment of its precedent debt, or an executory agreement within the scope of its business, describing themselves as its agents and having in fact authority to make the contract in question, and where these facts are known to the other party, the note or agreement is the contract of the corporate body, and not of the persons signing it, individually. (*Brockway* v. *Allen*, 17 *Wend.* 40. *Randal* v. *Van Vechten*, 19 *John.* 60.) The trustees of a school district are a *quasi* corporation, possessing power in certain cases and for certain pur-

poses to bind their district and create a corporate liability which will attach to their successors in their official capacity. I see no reason to doubt that a promissory note made to a teacher, for wages earned in the employment of the district is within the scope of this power. It has been held that these officers may bind the succeeding trustees of the district by a contract for the hiring and payment of a teacher, and even for the building of a school house, and indeed in every case which does not require a special tax and appropriation of funds by the inhabitants before the officers of the district are authorized to incur the expenditures. (*Silver* v. *Cummings and others*, 7 *Wend.* 181. *Williams* v. *Keech and others*, 4 *Hill*, 168.) I can see no difference in principle between those cases and the present. Indeed we are not required to go so far here; for this was not the creation of a debt for any purpose. That was already incurred by the employment and services of the plaintiff. The making this note was rather the liquidation or recognition of an existing indebtedness, of a character which it has been expressly held the trustees have power to create. (*Fister* v. *La Rue*, 15 *Barb.* 323.) The note in question here was made by the defendants in the court below, in payment of the plaintiff's wages for teaching in school district No. 4, in Philipstown, in Putnam county, and was signed by them, adding "trustees" to their names. It expressly states the fact that it was made for that purpose, and from the terms of the note and the facts proved and admitted on the trial, it is obvious that the plaintiff, who was the teacher for whose wages it was given, knew that the defendants made the note, intending to bind the district or its officers to pay the debt due to him from the district. The referee must have held the defendants personally liable on the ground of a want of authority to make this note, and, I infer, because of an original incapacity on their part, acting as trustees, to make such a paper. In this I think he erred for the reasons already given. Another possible objection to the note in question, that it was signed by only two trustees, is obviated by the admission at the trial that the other trustee was duly notified to attend the meeting at which the note was made, and

declined or omitted to do so. The rule of the common law, which is now declared by statute, (2 *R. S.* 555, § 27,) that when an authority is to be exercised by more than one officer, they must all concur in its exercise, or all meet and consult, and a majority agree to the act, is subject to the necessary qualification that if one is notified to attend and refuses, it is the same as if he had attended and dissented from the act of the majority. (*McCoy* v. *Curtice*, 9 *Wend.* 17.)

I think the defendants intended to contract for the district as trustees, and had the power to make this note as such, and that these facts were known to the plaintiff, and therefore the note declared on is the note of the trustees of the district and not of these defendants as individuals. The judgment must be reversed, and a new trial at the circuit ordered, costs to abide the event.

BROWN, P. J., concurred.

S. B. STRONG, J. The note on which this suit was instituted was given to the teacher of a district school, for his wages, by the trustees of the district. It is so stated on the face of the note, and that was sufficient to show for what it was given, and the capacity in which the makers acted. It was for a demand for which the makers were not personally responsible, and if they are to be considered as individual promisors it was without consideration. A want of consideration is an available defense in an action between the original parties, if known to the payee when he takes the note.

A relinquishment of the liability of the district, and possibly a suspension of the right to prosecute, for a time, might constitute a valid consideration. But taking a promissory note from the trustees was not a payment by the district; and if, as the plaintiff claims, the trustees had no authority to execute it in behalf of the district, there was no actual suspension of the right of action.

The word "trustees," if there had been nothing else, might have been considered as a *descriptio personarum*, but in this

instance the body of the note contained a statement that it was for and on account of the plaintiff's wages as a teacher in school district No. 4, for teaching, up to its date. That was a description of the consideration, which the plaintiff, by his acceptance of the note, admitted to be true.

There can be no doubt but that the trustees can bind their district by their employment of a teacher, and a promise to pay his wages. A verbal promise made after the performance of the service, would also be obligatory upon the district. And I can see no reason why the reduction of the promise to writing, although it might be in the form of a promissory note, should render it less efficacious.

The judgment should be reversed, and the complaint should be dismissed.

[KINGS GENERAL TERM, October 15, 1856. *Brown*, *S. B. Strong* and *Emott*, Justices.

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23 180
60 422

THE PEOPLE, *ex rel.* Johnson, *vs.* THE CITY OF BROOKLYN.

THE SAME *vs.* THE SAME.

Under the former charter of the city of Brooklyn, passed in 1834, the common council had no power to assess adjoining lots for flagging side walks. In June and April, 1850, the common council passed an ordinance, requiring the side walks on Tillary street to be flagged by the owners. Some of the owners of property upon the street failed to comply. In July and September, ordinances were passed, directing the work to be done by the city authorities, and that the expense should be a lien on the lots. The work was completed previous to the 1st of January, 1851. In 1851 the common council caused an assessment to be made, for this work, by the street commissioners, all the proceedings for which were in comformity with the new city charter, passed in 1850, but which did not go into effect until the 1st of January, 1851. *Held* that the work having been directed and completed while the charter of 1834 was in force, the payment or collection of the consequent expenses must be according to its provisions, and that the common council had no power to make, or collect, an assessment, under the provisions of the new charter, for the expenses of the improvement.

The People *v.* City of Brooklyn.

The provisions of the new charter, of 1851, relative to improvements, and the mode of raising the necessary expenses thereof, apply only to improvements subsequently to be made.

THIS was a certiorari to the city of Brooklyn, to review the proceedings of the mayor and common council in the matter of flagging portions of the side-walks of Tillary street, between Bridge and Navy streets, a part of which flagging was in front of, and adjacent to, the property of the relator; the expense of which flagging was apportioned and assessed upon the adjoining lands.

H. Hagner, for the relator.

N. F. Waring, for the defendants.

EMOTT, J. In both these cases it appeared that the common council of Brooklyn, in June and April, 1850, passed an ordinance requiring the side-walks on the particular street in question to be flagged by the owners. Some of these parties, and among others the relator, failed to comply. In July and September of the same year, ordinances were passed reciting the former ordinances and the failure of certain owners to obey them, and directing the work to be done by the city authorities, and that the expense of it should be a lien on the lots. Contracts were then made for the flagging, in August and September, 1850, between the city and contractors. When the work was actually done or paid for does not distinctly appear. In 1851 the common council caused an assessment to be made, for this work, by the street commissioners. Under the original charter of 1834, there was no power to assess adjoining lots for side-walks. That was conferred by the act of 1850, and all these proceedings were in conformity to that act. But the act of 1850 did not by its terms take effect previous to January 1, 1851; and as this improvement had been made, or the side-walks directed and subsequently constructed before the act took effect, the city acquired no right to institute assessment proceedings to pay for such antecedent acts.

The assessments should be set aside in both cases.

S. B. Strong, J. The proceedings of the corporate authorities, which it is sought to set aside by the certiorari in these cases, related to flagging the street side-walks adjoining the lots of the relator, and of several other proprietors. The work was directed, pursued and completed previous to the 1st of January, 1851, although the assessment was made and the collection of the amount assessed was directed, after that date. The entire work having been directed and completed while the act of 1834, constituting the then charter of the city of Brooklyn, was in force, the payment or collection of the consequent expenses must be according to its provisions. The appropriate application of the act which went into operation on the 1st of January, 1851, constituting the existing charter of the city, so far as it relates to improvements and the method of raising the necessary expenditures, is to those which should be subsequently made. If it was competent for the legislature to devolve the expenses of improvements previously perfected upon others than those who were bound to pay for them when they were made, an intent to effectuate what is so obviously unjust is not to be inferred. When there is a clear and positive injunction which may operate harshly, there is no room for construction, but when the claimed duty or power is only inferential, it is not to be presumed that the legislature intended to effectuate injustice. By the act of 1834, (§ 26, *subd.* 16,) the common council was authorized to "direct and regulate the flagging of side-walks or laying the same with bricks," but no power is given to impose the payment of the necessary expenses upon the adjoining owners. There is a provision, (§ 40,) authorizing the common council to devolve the expense of paving streets upon the owners of lands to be benefited thereby; but that did not sanction the procedure in this case, because, first, the statute makes an evident distinction between flagging side-walks and paving streets; second, the expenses were to be paid by all who were to be benefited, and not as in this instance solely by the owners of the adjoining lots; and third, the assessments were to be made by "the assessors of the city," and not as was done in this case, by the street commissioners.

That act, therefore, did not authorize the proceedings of which the relator complains.

The act which went into operation on the 1st of January, 1851, is, as has been already stated, inapplicable. If it had been applicable, there is an uncertainty as to the persons by whom the assessment was to be made, which would render the exercise of any power to that effect very hazardous. By the 22d section of title 2, the common council is authorized to cause side-walks to be flagged, and the expenses thereof to be assessed on the adjoining lots, in the same manner as for regulating, grading and paving streets. By the 22d section of title 4, it is provided that the expenses of regulating, grading and paving streets shall be assessed by one or more commissioners. And by the 30th section of the last mentioned title the expenses of flagging side-walks shall be assessed by the street commissioner. It is possible, and I think I have so decided, in a late case, that the provision in the 22d section of title 2, refers to flagging anew side-walks when the previous work does not conform to the ordinances of the common council. If it does I see no provision in the act authorizing the common council to devolve the expenses of a new flagging upon the owners of the adjoining lands. If the provision in the 2d title applies to original flagging, then there are two utterly discordant provisions in the same act, relative to the assessment to pay the contingent expenses. In such cases, where they purport to sanction an invasion of private property, neither should prevail. Our property should not be taken from us, for any purpose, without clear and unequivocal authority.

My conclusion is that the assessment in this case was not authorized by any statute, and that therefore it should be annulled.

BROWN, P. J., concurred.

Assessment set aside.

[KINGS GENERAL TERM, October 14, 1856. *Brown, S. B. Strong* and *Emott*, Justices.]

28 184
71, 336

POWELL & POWELL *vs.* NOYE.

Where mutual dealings had taken place between the plaintiffs and the defendant, and the plaintiffs delivered to the defendant a statement of the accounts between them, showing a balance of $842.09 due to the former; and the defendant took the account away with him, to see if it was correct, and kept the same several months; writing to the plaintiffs, from time to time that he intended to make good the balance of account against him; that the account should be examined and the balance paid; that he had no objection to sending his notes for the balance, but not at thirty or sixty days; admitting that his obligation to pay the amount was no less, as the matter then stood, than if the plaintiffs had his notes; and promising that if they desired it he would send his due bill *for the amount;* saying, at another time, that he could not pay the plaintiffs the balance they claimed against him, just then, but that he should pay what he owed them at the earliest date possible, &c.; but in none of these letters was any fault found with the plaintiffs' account, or any complaint that the balance claimed was too large; *it was held* that these letters, taken together, constituted a strong admission of the accuracy of the account; and that the same became a *settled account*, and the balance was admitted to be due.

Held also, that it was no objection to the account that a part of it consisted of what was due on certain joint transactions between the parties.

When a balance is struck, and admitted to be due, on partnership transactions, it may be recovered, in an action at law.

THIS action was brought to recover a balance claimed to be due to the plaintiffs upon an account stated. The defendant's answer contained a general denial. He also denied that there had been an accounting, and put in a counter-claim for balances on wheat sold, and for money laid out and expended. The cause was tried at the Kings county circuit, before Justice Rockwell, in June, 1855. The plaintiffs proved that they were, in the month of January, 1854, and previously, partners in business at the city of New York, under the firm name of Powell & Co., and that the defendant resided at Buffalo; that prior to January, 1854, the plaintiffs and defendant had had mutual dealings together in the purchase of wheat; that in February, 1854, the plaintiffs delivered to the defendant, at the city of New York, an account, headed "Interest account made up to January 31, 1854," showing a balance of $842.09 due to the plaintiffs from the defendant; that the defendant received the

said paper writing, saying, "I will take it to my hotel and see if it is correct, and will settle before I leave New York," but did not see the plaintiffs again before leaving the city. The plaintiffs here proved that five certain letters, the first bearing date March 21, 1854; the second April 7, 1854; the third April 17, 1854; the fourth May 6, 1854, and the fifth June 13, 1854, addressed to the plaintiffs, were in the handwriting of the defendant. The plaintiffs then offered in evidence the said five letters, for the purpose of proving an account stated. The defendant objected to the reading of such letters in evidence, on the ground that it had been proven that at the time the said paper writing was delivered to the defendant by the said plaintiffs several other accounts were also delivered to him, which related to the items charged in the said paper writing, and that said letters were not admissible in evidence for the purpose of proving an account stated, unless the plaintiffs produced the said other accounts, so delivered to the defendant at the same time with said paper writing, as the said letters referred, as well to the said other accounts as to the said paper writing, and their meaning was not intelligible unless the said accounts should be produced; in order that it might be seen to what accounts and matters the said letters referred. The court overruled the objection, and the defendant excepted, and the said letters were read in evidence. The material portions of those letters are stated in the opinion of the court. The plaintiffs rested, and the defendant moved the court to dismiss the complaint, on the ground that an account stated had not been proven, which motion was denied by the court, and the defendant excepted. After some further evidence, the court directed a verdict for the plaintiffs, for the sum of $842.09, with interest from the first day of January, 1854, to which the defendant excepted.

C. N. Bovee, for the plaintiffs.

I. T. Williams, for the defendant.

By the Court, S. B. STRONG, J. The parties had a meeting in February, 1854, when the plaintiffs produced and delivered to the defendant a statement of the accounts between them, specifying the balance due, and also some papers explanatory of some of the items included in the statement. The defendant took the statement to his hotel to see whether it was correct, and promised to settle before leaving New York. He left the city without again seeing the plaintiffs, or sending any communication to them. On the 21st of March following, he wrote to them that he intended to make good the balance of account against him, and that he had not had time to examine the accounts carefully, but he presumed they were correct. On the 6th of April following, he wrote that he should have the accounts examined in a few days, and that the balance would be paid "at the earliest day possible." On the 17th of the same month he wrote that as regarded sending his notes for the balance, he had no objection, but not at thirty or sixty days; and he added that he felt anxious to pay it at the earliest day possible. On the 6th of May following, he wrote again, saying, "I cannot consider my obligation to pay the amount any less, as the matter now stands, than if you had my notes. If you desire it, I will send you my due-bill *for the amount*." And on the 13th of the following June he again wrote to the plaintiffs, saying, "You demand a certain balance you claim as your due. I have replied I cannot pay it just now." "You will please to understand in the first place, I shall pay what I owe you at the earliest date possible." In none of these letters was any fault found with the plaintiffs' account, or any complaint that the balance claimed was excessive. It seems to me that the whole, taken together, constituted a strong admission of the accuracy of the account. It became a settled account, and the balance was admitted to be due.

It is no objection to the account that a part of it was what was due on certain joint transactions between the parties. When a balance is struck and admitted to be due on partnership transactions, it can be recovered in an action at law.

There was not any pretense of fraud; nor that the defendant

was taken by surprise; nor that he had not, before his admission of the correctness of the account, had full opportunity for examination; nor that he had not in fact fully examined it. Under such circumstances, and when in consequence of the defendant's admission vouchers may have been destroyed, it would be doing great injustice to suffer the account to be opened. merely because all the papers which were delivered with the accounts were not produced on the trial, or because some of the items were mere balances.

The judgment at the special term was right, and should be affirmed, and a new trial denied, with costs.

[KINGS GENERAL TERM, October 14, 1856. *Brown, S. B. Strong* and *Emott*, Justices.]

OWEN *vs.* BOERUM.

23 187
29 470
14h 142

Where a submission to arbitration recited that a controversy existed, in relation to the settlement of the accounts between the parties, and *the claims of each upon the other*, and the parties submitted "the said controversy and claims" to arbitrators; *Held* that this embraced claims for damages sustained in consequence of an alleged wrongful dispossession of a party from demised premises, and the tortious conversion of personal property; where it appeared that those claims, as well as claims upon the accounts between the parties, grew out of a written agreement respecting the occupation of a grapery and greenhouses, and the cultivation of the plants, &c. therein.

Where there was no proof that an award was not made within the time fixed by the submission, except that it bore date the day after the time fixed, and that it was not delivered until the day it was dated; *Held* that this was not sufficient to show that the award was not ready on the day appointed; it not appearing that it had been called for before it was delivered.

Until the contrary affirmatively appears, it will be presumed that the arbitrators performed their duty, and had the award ready within the time fixed. The mere date, at the end of the paper, is not enough to establish the contrary.

An award which leaves nothing to be done, to dispose of the whole matter in controversy, except mere ministerial acts, is sufficiently certain and final.

An award need not be under seal, unless the submission requires it to be so. The mere fact that the submission is under seal, does not make it necessary to affix seals to the award.

Owen *v.* Boerum.

Nothing which does not appear upon the face of an award can be pleaded or proved against it, in an action at law.

Not even fraud or corruption can be set up against an award. The party averring it must bring his suit, or in some proper way assert his claim to have the award set aside.

Where parties submit to arbitration all their demands against each other, it is no objection to the validity of the award, that any particular subject thus submitted was not laid before the arbitrators. Nor will the omission to lay such subject before the arbitrators prevent the award from being a bar to a suit brought to recover the amount of the omitted item.

MOTION for a new trial, upon a case. The complaint alleged that on the 20th of November, 1850, the defendant let and demised to the plaintiff, for the term of two years, a certain grapery and hot-houses, with their contents, belonging to the defendant, at Flushing, upon certain terms and conditions particularly specified in a written agreement between the parties, of the date above mentioned. The plaintiff alleged that he entered into possession of the demised premises at the date of the agreement, and continued in the possession thereof until he was wrongfully dispossessed by the defendant; and that he had faithfully performed the said agreement, on his part. But that the defendant, on or about the 25th day of August, 1852, without just cause or legal right so to do, evicted and expelled the plaintiff from the demised premises, and wrongfully and illegally took and converted to his own use the shrubs and plants of the plaintiff, worth the sum of $275, and a valuable crop of grapes upon the vines in the grapery, the plaintiff's share of the net proceeds of which was worth the sum of $450. The plaintiff alleged a demand and refusal of the shrubs and plants, and claimed that he had sustained loss and damage by reason of the illegal and wrongful act of the defendant in dispossessing him of the demised premises, and depriving him of his shrubs and plants to the amount of $250. And he demanded judgment that he should recover of the defendant the said sum of $975 for his damages by him sustained by reason of the illegal and wrongful act of the defendant, besides costs, &c. The defendant, by his answer, admitted that the parties entered into a written agreement on the 20th of November, 1850, relative to working and cultivating

the land, fruit, plants and flowers therein mentioned, which agreement was set out *in hæc verba.* He denied that he wrongfully dispossessed the plaintiff; or that the plaintiff faithfully performed the agreement on his part; or that the defendant wrongfully and illegally converted to his own use the plaintiff's shrubs and plants; or that the plaintiff had any shrubs and plants upon the premises. He alleged that the plaintiff failed to comply with said agreement, on his part; specifying various particulars; and that in consequence of such breaches and wrongful acts of the plaintiff he, the defendant, did, some time in August, 1850, notify the plaintiff to quit possession of the premises and surrender the same to the defendant, which he did. He alleged that the grapes on the vines, at the time he resumed possession, were not worth $200; and that by the negligence and misconduct of the plaintiff in managing and working the premises, the same had been injured and deteriorated and depreciated in value to the amount of not less than $1000; that the amount of money for which the plaintiff, while in possession, sold the produce of the premises and retained the proceeds, was not less than $1000, one half of which belonged to the defendant; and that the plaintiff was further indebted to him in the sum of $250 for pots, plants, shrubs, flower roots, &c. taken and carried away by the plaintiff. And for a further answer, the defendant alleged, that after the defendant so resumed possession of the premises, and after the plaintiff's alleged cause of action accrued, to wit, on the 15th day of September, 1852, the plaintiff and defendant, by mutual bonds, on that day dated and executed by the parties, submitted themselves to the arbitration of, and engaged in all things well and truly to stand to, obey, abide, perform, fulfill and keep the award, order, arbitrament, final end and determination of Charles A. Hamilton, William W. Valk and William Areson, arbitrators, indifferently chosen, elected and named, as well by and on behalf of the said plaintiff as the said defendant, to arbitrate, award, order, judge and determine of and concerning the controversy, claims and accounts between the said parties. And the defendant averred that said submission to arbitration embraced the alleged

cause of action for which this suit is now brought. And that in pursuance of said submission the said arbitrators, after taking upon themselves the burden of said arbitration, and having duly considered the subject matters submitted to them by said bond, did make and publish their award and final decision in the premises, on or about the 22d day of September, 1852, as by the said award in writing, under the hands of said arbitrators, would more fully appear, of which said award the plaintiff had notice; and the defendant referred to said written award for greater certainty. And he claimed judgment against the plaintiff for the sum of $750, for the money so as aforesaid due to the defendant from the plaintiff, and for his damages as aforesaid, suffered at the hands of the plaintiff.

The plaintiff put in a reply, denying the allegations in the answer. At the trial, after the plaintiff had rested his case, the counsel for the defendant produced and offered in evidence the following paper:

"*Know all men by these presents*, that whereas a controversy exists at this present time between Jacob B. Boerum, of the town of Flushing, county of Queens, and state of New York, and Cadwallader Owen, of the town, county and state aforesaid, in relation to the settlement of the accounts between the said parties, and the claims of each upon the other; now, therefore, we, the aforesaid Jacob B. Boerum and Cadwallader Owen, do hereby agree to submit the said controversy and claims to the decision and final determination of Charles A. Hamilton, William W. Valk and William Areson, of the town, county and state aforesaid, as sole referees in this behalf; and we do mutually covenant and agree to and with each other, that we will abide by, keep and faithfully perform in all things, the award to be made by the said referees, the said award to be made and ready for delivery, by the said referees, to the said parties in difference, or either of them as shall desire the same, on or before the 22d day of the present month; and further, that each of us, the parties signing this bond of reference, are bound to the other in the penal sum of five hundred dollars, good and lawful money of the United States, to obey, perform, keep and

truly stand to the award and final determination of the referees aforesaid. Flushing, September 15, 1852.

(Signed,) CADWALLADER OWEN. [L. S.]
JACOB B. BOERUM." [L. S.]

The counsel for the plaintiff objected to the same on the following ground, as irrelevant: That it related to matters of account only, and did not embrace the present cause of action. The court overruled the objection, and the counsel for the plaintiff excepted. Said paper was read in evidence. William W. Valk, called and sworn for the defendant, testified as follows: "I was one of the arbitrators named in the submission; the paper shown me is signed by the three arbitrators; I delivered it to Mr. Owen, who came to my office, asked for, and got it." Thereupon the counsel for the defendant offered said paper in evidence, which was in the words and figures following, viz:

"*To all to whom these presents may come:* We, Charles A. Hamilton, William W. Valk and William Areson, of Flushing, L. I., send greeting: Whereas a certain controversy has existed, and does now exist, between Jacob B. Boerum and Cadwallader Owen, both of Flushing, and whereas the said controversy and matters in dispute between the parties have been submitted to us as referees, as does more fully appear by their submission in writing, dated September 15, 1852: Now, therefore, know ye, that we, the said referees mentioned in the said submission, having heard the allegations of the parties, and examined their accounts, books and vouchers relating to the matter in dispute, do make this award, that is to say: The said Jacob B. Boerum shall pay, or cause to be paid, to the said Cadwallader Owen, the sum of one hundred dollars, within thirty days from the date hereof, in full payment, discharge and satisfaction of all claims and demands whatsoever, growing out of or connected with the matters herein decided, and mentioned in the aforesaid submission. And we further award and decree, that all the plants claimed by Jacob B. Boerum, as per list in old book, marked A No. 1, and all the plants claimed by Cadwallader Owen, as per list in old book, marked B. No. 2, be given up to the said parties claiming them, or in case of loss, to be made

good in kind or value, the said plants to be selected by Messrs. Con and Silliman, out of the stock of plants now at Jacob B. Boerum's residence, as per list taken of the same by Messrs. Valk and Areson, on the 27th of August last, and the remainder of the plants, after the above selection, to be equally divided between Jacob B. Boerum and Cadwallader Owen, by the same parties. And we do further award that the bill marked C No. 3, be collected by Cadwallader Owen for his own benefit and use, and that any loss on the said bill be his exclusively; and we do further decree, that by this award, now made by us in good faith, each of the said parties who have submitted their grievances to us, is released of all demands, claims, controversies, damages and accounts whatsoever connected with, or relating to, or concerning the aforesaid matter and things in controversy and dispute.

In witness whereof, we have hereunto subscribed our names, this 23d day of September, in the year 1853.

(Signed,) Wm. W. Valk.
Wm. J. Areson.
Chas. A. Hamilton."

Flushing, L. I., Sept. 23d, 1852.

The counsel for the plaintiff objected to the evidence on the following grounds: 1st. That it purported to have been made subsequent to the time within which it was required by the submission to be made and ready for delivery. 2d. That it was not under seal; whereas the submission was under seal. 3d. That it was not final. The court overruled the objection, and admitted the evidence; to which ruling of the court, as to each point of objection, the counsel for the plaintiff excepted.

One of the arbitrators was sworn, as a witness, and testified that the arbitrators went into an examination of the accounts of the parties as presented by them, and found Owen indebted to Boerum in the sum of $30; that they then took up the subject of grapes; that by agreement two of the arbitrators visited and estimated the grapes; that the parties themselves produced lists of the plants belonging to each of them, and the arbitrators acted upon those lists, which were not disputed, at

the time. The witness was asked, "Were you ever present at any meeting of the arbitrators, when testimony was taken as to the amount and value of grapes in the grapery?" The counsel for the defendant objected to the question. The court sustained the objection, and excluded the testimony; to which decision the counsel for the plaintiff excepted. Question by counsel for the plaintiff: "Were you ever present at any meeting of the arbitrators at which any testimony was taken as to the amount of plants belonging to the parties respectively, or their value?" The counsel for the defendant also objected to this question; the court sustained the objection, and the counsel for the plaintiff excepted. Question by the counsel for the plaintiff: "Was there ever evidence taken, or statement of the parties mutually assented to introduced, or personal inspection of the subject matter of the controversy had at any meeting of the arbitrators?" The counsel for the defendant objected to the question; the court sustained the objection and excluded the question, and the counsel for the plaintiff again excepted.

The court directed a verdict to be rendered for the defendant; and the jury rendered a verdict accordingly.

Willard & Anderson, for the plaintiff. I. The submission embraced only matters of account, and, therefore, did not include the present right of action. The admission of the award in evidence was error.

II. The award bears date after the day on which it was required to be made, and there is no evidence that the parties waived this defect; the court, therefore, erred in admitting the award in evidence.

III. Inasmuch as the submission was under seal, the award should have been under seal.

IV. The award was not final, inasmuch as there remained a duty to be performed by persons named by the arbitrators, in its nature judicial. (*Waite* v. *Barry*, 12 *Wend.* 377. *Cockson* v. *Ogle, Lutw.* 169. *Kyd on Awards*, 127.

V. The court erred in excluding the evidence offered on the part of the plaintiff, the effect of which was to show that no arbi-

tration had in fact taken place. (*Peters* v. *Newkirk*, 6 *Cowen* 103. *De Long* v. *Stanton*, 9 *John.* 38.)

John G. Lamberson, for the defendant. I. The objection that the submission related to matter of account only, was not well taken. (1.) The submission recites, "that a controversy exists in relation to the settlement of the accounts between the parties *and the claims of each upon the other.*" This language can only be construed to intend a submission of all matters in difference between the parties. The rule of law being, that submissions are to be construed and expounded according to their signification in common parlance. Thus, a submission of all demands extends to real as well as personal property. (*Munro* v. *Alaire*, 2 *Caines*, 320. *De Long* v. *Stanton*, 9 *John.* 38. *Fidler* v. *Cooper*, 19 *Wend.* 285. *Emmet* v. *Hoyt*, 17 *id.* 410.) The evidence and allegations introduced before the arbitrators, show conclusively that the subject matters of this action, and only those, were intended to be settled between the parties.

II. The objections to the award were not well taken. (1.) It does not appear in any manner, even by implication, that the award was not made up and ready for delivery within the time required by the submission. All that appears in relation to the matter is, that it was not called for until probably the 23d of September; that it had been ready to deliver on demand, and was in the hands of one of the arbitrators, who dated it and handed it to the plaintiff when demanded; thus all the requisites as to time were complied with. (*Perkins* v. *Wing*, 10 *John.* 143.) (2.) The submission did not call for or require an award under seal; nor would a seal under any circumstances be of any force to give vitality to an award. (*Stanton* v *Henry*, 11 *John.* 133.) (3.) The award is certain and final, in accordance with the whole line of decisions upon those points. (2 *John.* 57. 13 *id.* 27. 5 *Wend.* 268. 1 *Caines*, 304. 14 *John.* 96.) An award referring to certain extrinsic circumstances is sufficiently certain. (5 *Wend.* 14. 13 *John.* 27.) Award is sufficient, if it leaves a ministerial act to be done or

calculation to be made. (*Waite* v. *Barry*, 12 *Wend.* 377. *Case* v. *Ferris*, 2 *Hill*, 75. 1 *id.* 489.) (4.) The award is a bar to the action. (11 *John.* 189.)

III. The questions propounded by the plaintiff's counsel at the trial and overruled by the court, were incompetent and inadmissible. (1.) The witness being called by the plaintiff, and having testified directly upon the same points referred to by the questions, the questions were each and all in the nature of a cross-examination of his own witness. (2.) They were inadmissible as tending to impeach the award. The testimony of an arbitrator is inadmissible to impeach his award. (2 *John.* 399 17 *id.* 405. 5 *Cowen*, 383.) An award made in good faith is conclusive. Neither party is permitted to prove that arbitrators decided wrong either as to law or fact. (*Winship* v. *Jewett*, 1 *Barb. Ch.* 173.)

By the Court, Emott, J. There is no sufficient objection to the award on which the judge directed the verdict for the defendant. The submission embraced the settlement not only of the accounts between the parties, but of all claims of each upon the other. The disputes between them at that time, as far as we can see, all grew out of their agreement in respect to the green houses and the cultivation of the plants which are the subject of the present suit. From this resulted finally claims as to the ownership of the plants &c., which might be regarded in different aspects, either as claims for accounts of the value or the proceeds of the property, or as a charge of a tortious conversion. It would be doing violence to the settled rules of construction in such cases, and to the benign and favorable interpretation of such instruments which the courts have always adopted, to hold that either kind of claims or demands, or a right of action which might be brought in either form, did not come within the terms of this submission.

There is no proof that either of the parties desired the award before the day of its date, or of any demand upon the arbitrators on the day set in the submission for making the award. There is no proof upon the subject, on either side, ex-

cept that it was delivered when it was called for, and that it bears date on the 23d September, the day after the time set in the assignment for the award to be ready for either party who should demand it. This is not sufficient to show that the award was not ready on that day. When it was called for it was ready, and if this was not a literal compliance with the submission, it will at any rate be presumed, until the contrary is affirmatively shown, that the arbitrators performed their duty and had the award ready within the time set. The mere date at the end of the paper is not enough to establish the contrary.

Nor is there any objection to the finality of the award. It leaves nothing to be done to dispose of the whole matter in controversy except mere ministerial acts, and that has been repeatedly held no objection to an award. (12 *Wend.* 377. 2 *Hill*, 75.) It was claimed that because the submission was by a sealed instrument, the award must also be under seal; but this is not the rule. A seal is not requisite in such cases, unless the submission stipulates for that. Whatever forms are required by the terms of the submission must be observed, but there is no connection between the submission and the award that would make it necessary that one should be under seal because the other was.

The evidence offered, to impeach the award, was also rightly rejected. Even fraud or corruption cannot, according to the better opinion, be set up against an award, in an action at law. The party averring it must bring his suit or in some proper way assert his claim to have the award set aside. (5 *Wend.* 518.) Certainly nothing else not appearing on the face of the award can be pleaded or proved against it. (12 *Wend.* 158.)

And the evidence which the defendant offered, so far from proving corruption or partiality, would have shown, if any thing, that the particular matters referred to were not considered or examined or brought before the arbitrators at all. This is clearly immaterial. If the submission included these subjects it is of no consequence to the validity of the award that any particular subject to which it extended was not laid before the

arbitrators. (*Wheeler* v. *Van Houten*, 12 *John.* 311. *Fidler* v. *Cooper*, 19 *Wend.* 285.)

After a party has agreed to submit all his claims upon another to a domestic tribunal of their own choosing it would be exceedingly unjust to allow him to remove a portion of his demands and make them the matter of a subsequent suit. The only question is whether the demands were within the jurisdiction of the arbitrators. If the parties placed them there they must take the consequences if they do not invoke the exercise of all the powers of their umpires, or bring to their notice all the subjects which they are appointed to finally determine.

No errors were committed at the trial, and the motion for a new trial must be denied with costs.

[Kings General Term, October 14, 1856. *Brown* and *Emott*, Justices. Rockwell, J. died after the argument, and before the decison.]

The People, *ex rel.* Flint, *vs.* Cline and others, commissioners of highways of the town of Amenia.

Where commissioners of highways, in their determination or order refusing to lay out a road, state that twelve freeholders have met and decided that such road is necessary and proper, this is, in effect, an admission by them that such freeholders were competent, and unobjectionable. But as such a statement involves the question of jurisdiction, it is not conclusive, and may be re-examined by the referees appointed by the county court, on appeal from the order of the commissioners.

The fact that one of twelve freeholders who meet and view the site of a proposed road and certify whether it is necessary, and whether it will be proper to lay it out, is the brother-in-law of a trustee of a church which holds the title to a part of the land to be taken for such highway, does not render him incompetent to act. He is not "of kin to the owner" of the property, within the intent and meaning of the statute.

A trustee of a religious society is not literally an owner of its land. That is in fact owned by the society. Hence the relative of a trustee is not of kin to an owner.

THIS was a common law certiorari, to review a decision made by referees, upon an appeal to the county court, from a de-

termination of the commissioners of highways of the town of Amenia, Dutchess county, refusing to lay out a road. Augustus Flint, of Amenia, applied to the commissioners of highways of that town to lay out a new road therein. After his giving public notice of such application, 14 citizens of Amenia met, April 25th, 1853, viewed the route of the proposed road, and certified in writing that they were freeholders of that town, were liable to be assessed therein for highway labor, were not interested in the lands on the route of said road, nor of kin to the owners thereof, nor to the applicant for the said road, and that the same was necessary and proper. On the presentation of this certificate to them, the commissioners met, May 28th, 1853, on giving due notice to the public, viewed the route of the proposed road, and decided that "they do hereby refuse to lay out and alter the same according to said application," on the ground "that the interests of the town would not warrant the expenditure." The decision of the commissioners was duly filed in the town clerk's office of Amenia. The relator afterwards appealed from this decision to the county judge of Dutchess, who duly appointed Daniel D. Akin and others as referees to hear and determine all the appeals relative to this road. After giving proper notice to the commissioners of Amenia, the referees met, Sept. 30th, 1853, to hear the appeal of Flint, the relator, in pursuance of their appointment. The commissioners of highways of Amenia and Mr. Flint appeared before the referees at their meeting. The proceedings had before the referees at that meeting were stated in their return. They there certify in substance that the commissioners, at the commencement of the investigation of the appeal, objected to all further proceedings in relation thereto, on the ground that twelve competent freeholders did not view the route of the proposed road and certify that the same was necessary and proper; and that the commissioners admitted that eleven of the persons who signed said certificate were in all respects qualified according to the statute to do the same, and that one other of the three remaining persons, was also so qualified, except that, in consequence of his marrying a niece of Flint, the relator, this freeholder was of kin to the applicant for

the road. Also that James, one other who signed said certificate, was a brother-in-law of Mr. Garnsey, who, as trustee of the Baptist church, held title to lands through which the road was proposed to be laid, and that A. P. Bailis, another of the jury, was a trustee of said church, holding jointly with Garnsey the title of said church property. These facts, on which the objections of the commissioners were based, were admitted to be true by the parties.

The referees in their return further stated, that after hearing these facts and without viewing the route of the proposed road, or investigating the merits of the appeal, whether or not such road were necessary and proper, they affirmed the decision of the commissioners upon the ground that "the application made to the commissioners was not signed and sworn to by twelve reputable freeholders of the said town of Amenia, not interested in the lands through which the road was to be laid, nor of kin to the owners thereof, pursuant to the statute in such case made and provided." The decision of the referees was in writing signed by the referees, and filed in the office of the town clerk of said town. By an order of this court, made at a special term, on the 3d of March, 1856, John H. Cline, George Kirby and G. Chamberlain, commissioners of highways of the town of Amenia, were substituted as defendants in the place of the referees, against whom the action was originally commenced.

A. Hermance, for the relator.

E. M. Swift, for the defendants.

By the Court, S. B. Strong, J. The statement, in the determination or order of the commissioners, that twelve freeholders had met and decided that the proposed new road and alterations were necessary and proper, was in effect an admission by them that such freeholders were competent and unobjectionable. As however it involved the question of jurisdiction, it was not conclusive, and might be re-examined by the referees when the matter came before them. (*The People* v. *Goodwin*, 1 *Sel.* 568.)

It seems to me, however, that at least twelve competent freeholders did meet, view the site of the proposed road, and sign a certificate that it was necessary, and would be proper, to lay it out, as the statute requires. There were fourteen in all. It is admitted that eleven were unobjectionable. One other (Reed) had married a niece of the applicant, who was also one of the owners of the land which would be required for the proposed road, and therefore the statute rendered him incompetent. Another (Bailis) was a trustee, and the remaining one (James) was the brother-in-law of another trustee, of the Baptist church, which held the title to a part of the land to be taken for such highway. And it was contended before the referees, and decided by them, that Bailis was "interested" in such land, and that James was "of kin to the owner thereof," within the intent and meaning of the statute. There is a difference in the description of the interest of the examiner, and the estate of the relative. Any interest, even a fiduciary one, in the examiner himself, might to some extent bias his mind, and be sufficient to warrant his exclusion. But it is different as to the relative. The statute requires that he should be an owner. Now a trustee of a religious society is not literally an owner of its land. That is in fact owned by the society. The relative of a trustee is not therefore of kin to an owner. There can be no reason for extending this provision beyond its literal interpretation. The words "of kin" probably include all who are related within the ninth degree; and it is going quite as far as law or common sense would require, to decide that the laying out of a proposed new highway would be void from a want of jurisdiction, because one of the examiners was a third cousin of a personal owner. To apply the exclusion to the relatives of the trustees of a church, and others acting in a fiduciary capacity, would probably cause the abandonment of half of the new roads in the country. I am aware that four of the judges of the court of appeals decided, in the case of *Oakley* v. *Aspinwall*, (3 *Comst.* 547,) that a judgment was void because one of the judges, who had taken part in the decision at the earnest request of both parties, was second cousin of a party who had no interest in the controversy, and who had been, as

was admitted on the argument, fully indemnified. But that decision was ably opposed by Chief Justice Bronson, with whom two other judges concurred; and the doctrine has never been sustained by an actual majority of the judges of that court, and I trust it never will be. It seems to me that in this case James was competent to act; and as, including him, there were twelve competent certifiers, the referees erred in deciding that there was a want of jurisdiction and for that cause affirming the decision of the commissioners.

The decision of the referees should be reversed and their order vacated. And they should be required to proceed on the appeal pursuant to the statute.

[Kings General Term, October 14, 1856. *Brown, S. B. Strong* and *Emott*, Justices.]

Cleveland *vs.* Boerum and others.

23 201
27 252
24a 613

Where a suit is instituted for the foreclosure of a mortgage, and during its pendency the mortgagors are declared bankrupts, and they assign their property to the official or general assignee in bankruptcy, such assignee need not be made a party to the suit.

And if the assignee, without making any effort to be substituted as a party, or to interfere in the foreclosure suit, suffers the same to proceed to judgment, and sales to be made to innocent purchasers, by whom the lands are improved, and he then sells and conveys the right and interest of the bankrupts in the equity of redemption, to third persons, the latter cannot redeem the mortgaged premises from the mortgage and sale.

Under such circumstances, the equity of redemption of the mortgagors, and all claiming under them as purchasers, whose title accrued after the notice of *lis pendens* in the foreclosure suit was filed, including their assignee in bankruptcy, is effectually barred by the decree in that suit.

THIS was a motion to dismiss the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action. The action was brought to redeem property from a mortgage. The material facts will be found in the opinion of the court.

A. Thompson, for the plaintiff.

John A. Lott, *Philip Hamilton* and *S. M. Meeker*, for the defendants.

S. B. STRONG, J. The plaintiff in this action seeks to redeem a large number of lots in Williamsburgh from a mortgage upon them, and other lands, made by John S. McKibben and Thomas Nicholls, to Abraham Henry and William Boerum. The mortgage was dated and executed on the 30th of March, 1836, and given to secure the payment of $39,000 with interest, on or before the first day of April, 1841; and was recorded on the second day after its date. On the same day McKibben and Nicholls conveyed the one-fourth part of the mortgaged premises to George D. Strong, and on the 18th of December, 1837, Nicholls conveyed his remaining estate in such premises to his co-tenant, McKibben, for the consideration of one dollar. Previously to February, 1842, the mortgage debt had been reduced to $32,000, and some portions of the land had been released from the lien of the mortgage. In that month the mortgagees instituted a suit in the then court of chancery against McKibben, Strong and others, to foreclose the mortgage, and a notice, in the usual form, of filing their bill, and of the pendency of the suit, was duly filed on the 7th of March, 1842. McKibben and Strong were, upon their respective petitions, declared and decreed to be bankrupts under the act of congress of the 19th of August, 1841, the former on the 16th of June, and the latter on the 28th of July, 1842, and William C. H. Waddell thereupon became their assignee, pursuant to his general appointment by the district court. The foreclosure suit was then pending, and the plaintiffs therein proceeded without making such assignee a party. A decree of foreclosure and sale was entered (according to the complaint) on the 22d of November, 1842, but in reality, subsequent to that date. Pursuant to that decree, such parts of the mortgaged premises as had not been released, were sold in several parcels to various purchasers on the 7th of January, 1843, for the aggregate sum of 19,351 dollars and 12

cents. Deeds to the purchasers were subsequently executed, under which the defendants in this action, some directly, but most of them by subsequent conveyances, now hold their respective lots. Waddell, the assignee, conveyed to the plaintiff McKibben's interest in the mortgaged premises by a deed bearing date on the 24th of November, 1845, for fifty cents, and Strong's interest in said premises, by two deeds, dated respectively on the 5th and 18th of March, 1846, each for the consideration of one dollar. In February, 1846, the plaintiff tendered to Abraham and Henry Boerum the amount of the unpaid principal and interest of the mortgage, with such taxes and assessments on the mortgaged premises as they had paid, which tender was refused by them. The plaintiff now asks and demands that it may be ordered and adjudged that he is entitled to and may redeem the said premises from the said mortgage; that an account may be taken of what is now due, the interest to be calculated up to the time of his tender, and no longer; and that upon the payment of what may be found to be due within a period to be prescribed by the court, the defendants may be decreed to surrender to the plaintiff possession of the premises held by them, with their title deeds, and to reconvey and reassign such premises to him, free from all charges and incumbrances.

It is quite apparent, from the facts which I have stated, that if the plaintiff has acquired any interest in the premises in dispute, it is as a prowling assignee. Waddell, the assignee in bankruptcy although apprised by the inventory annexed to McKibben's petition, that he and his co-tenant were entitled to the equity of redemption in the mortgaged premises, and that proceedings to foreclose the mortgage had been instituted, made no effort to be substituted as a party, although the act gave him the right, and if the interest of creditors required it, made it his duty to do so. Without any attempt to interfere, he suffered the foreclosure suit to proceed to judgment, sales to be made to innocent purchasers, the lands to be held and improved by them or their vendees for upwards of two years, and then conveyed a supposed right (for the benefit of creditors) for the sum of two

dollars and fifty cents—a sum which was probably insufficient to pay the expenses of the transaction. These circumstances must have been known to the plaintiff, and he must have supposed, too, that he could not enforce his claims, if at all, without expensive litigation, and to the prejudice of those who had acted in good faith, and doubtless with ordinary caution. Still, a prowling assignee, and especially one who has purchased under an official sale, may have a right to redeem, (*Anon*, 3 *Atk.* 313,) and if "the law allows it," the court must "award it."

The plaintiff contends that the decree in the foreclosure suit did not bar the equity of redemption, as the right of the owners thereof, who were two of the original defendants, had during its progress become vested in their assignee in bankruptcy, who had not been made a party. This is his main position, and if he fails in establishing that, he must fail altogether. There can be no doubt as to the existence or soundness of the rule, that in an equitable action in rem relative to real estate, the interest of a purchaser from one of the defendants during the pendency of the suit, is barred by the decree, although such purchaser may not have been made a party. Lord Bacon, in the fourth volume of his works [p. 515,] says, that "no decree bindeth any that cometh in bona fide by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill or order; but when he comes in pendente lite, and while the suit is in full prosecution, and without any order of allowance or privity by the court, then regularly the decree bindeth." In the case of the *Bishop of Winchester* v. *Paine*, (11 *Ves.* 194,) Sir William Grant says, that "he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title—the litigating parties are exempted from the necessity of taking any notice of a title so acquired; as to them it is as if no such title existed, otherwise suits would be interminable, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it." These remarks were cited with approbation, and the principle

was fully recognized by Chancellor Kent in *Murray* v. *Ballou*, (1 *John. Ch. R.* 578, 579, 580.) The rule is generally laid down without any exception or modification. Its terms are sufficiently broad to include the assignees of a bankrupt or insolvent debtor, who are technically purchasers of the real estate. Chancellor Walworth seems to think that such assignees are exempt from the rule. (*Sedgwick* v. *Cleveland*, 7 *Paige*, 291. *Anon*, 10 *Paige*, 20. *Johnson* v. *Fitzhugh*, 3 *Barb. Ch.* 360.) In the anonymous case in 10*th Paige* the point was not at all discussed and the opinion was expressed upon a mere motion. In the case in 3*d Barbour* the question was not necessarily involved in the decision, although it is true that a defendant in a former suit had been discharged as a bankrupt, and an assignee had been appointed *pendente lite* who had not been made a party. The point was not raised by the counsel, who objected in other particulars to the decree in the original suit. The vice chancellor (Judge Gridley) had said "where then was the irregularity in the decree? Most clearly there was none." The chancellor, without any suggestion to that effect at the bar, said, "the decree in this was undoubtedly irregular, as the assignee in bankruptcy was not brought before the court." He cited no authority for this, but doubtless relied upon his decisions in the two earlier cases which I have quoted. The reason given by him in *Sedgwick* v. *Cleveland*, (7 *Paige*, 291,) is that the assignee upon whom the interest of the defendant has been cast by operation of law for the benefit of others, has a right to be heard for the protection of that interest. So indeed he has, and it would be erroneous to refuse him the exercise of it if he should claim it. But where would be the injury, if it should be left to his option to claim it or not? If the right should be of any probable value, it would be the duty of the assignee to take affirmative action to sustain it, and make it available for the benefit of the creditors. If it should be worthless, there would seem to be no reason why the plaintiff, whose proceedings had been originally correct, should be put to a useless additional expense by reason of the conduct of an opponent, in which he had no participation. There would seem to be no good reason for in-

fringing a useful general rule, merely because an assignee might abuse or neglect his trust. Possibly, it might be a violent presumption, that an assignee would ordinarily have actual notice of the pendency of a suit against the bankrupt, particularly where the initiatory proceedings in bankruptcy had been instituted against him without his concurrence. But since the passage of our first statute, relative to filing notices of lis pendens, (*Act of April* 17, 1823, § 11, *p.* 213,) a knowledge of the pendency of suits in equity relative to real estate is easily attainable. The inventory of the estate of a bankrupt, or of an insolvent debtor, would apprise his assignee of the location and description of the real estate, and if that should not set forth (as it did in this case) that it was the subject of litigation, the fact might be readily ascertained at the office of the clerk of the proper county. The 3d section of the bankrupt act of 1841 provided that all suits in which the bankrupt is a party, might be prosecuted or defended by the assignee to their conclusion, in the same way, and with the same effect as they might have been by the bankrupt. With the knowledge which he could obtain from the notice of lis pendens, and the power to interfere in the suit given to him by the act, he could do full justice to the creditors without being brought in as a party by the plaintiff. Chancellor Walworth cites but one (and that an American) authority for his position, that the assignee of a bankrupt, constituted during the pendency of a suit, must be made a party, in order that the judgment should bind any part of the assigned property. It seems to be the rule in England, that bankruptcy in either party does not abate the suit, whether in equity or at law. (1 *Cook's B. L.* 621–4, *Hewitt and others, assignees of Robbins and others, bankrupts*, v. *Mantell*, 2 *Wilson R.* 372, *per Bathurst, J.*) The assignee may undoubtedly be let in to prosecute or defend the suit, but it should be at his own option, and not at the instance of the other party, and if he should not elect to interfere, the judgment would nevertheless be valid. If the action should be against the bankrupt, and for a claim which would be barred by his certificate, he might avail himself of the defense, even after judg-

ment. But surely no proceeding in bankruptcy could preclude the holder of a mortgage from instituting or maintaining an action to coerce the sale of the mortgaged property for the satisfaction of his debt. The case cited by the chancellor (*Deas* v. *Thorn and others*, 3 *John.* 543) is certainly a strong one, to show that the assignee must be made a party, if the objection is raised during the progress of the suit; but it was not decided in that case that if the action is suffered to proceed without the addition or substitution of the assignee as a party, a judgment would be ineffectual as to the assigned interest. The ordinary effect of a judgment *in rem*, as to real estate is, that it binds the original parties and those who may have succeeded as purchasers, to their interest, as to the subject matter of the suit, during its pendency; and it cannot be divested of that attribute while it is suffered to stand. The judgment in the foreclosure suit has not been assailed in its totality. The plaintiff has not made any attempt to set it aside, or to procure a judicial declaration of its entire nullity, but simply seeks to arrest one of its conceded incidents. The decision in *Deas* v. *Thorn* had no reference to real estate, to which the rule that purchasers during the pendency of the suit, are bound by a judgment against the original parties from whom they derive title, is mainly, if not exclusively, applicable. The rule laid down in that case should not be extended and applied to cases where it would be productive of serious and often insurmountable difficulties. It frequently happens in foreclosure suits, that some of the parties entitled to the equity of redemption, or who have liens upon the mortgaged lands, are residents of other states, or of parts unknown, and in the fluctuations of the present age, they may become bankrupts or insolvent debtors, and find it necessary or expedient to take the benefit of some act for the relief of such unfortunate persons, during the progress of the suit. Now if in such cases the judgments would be ineffectual unless the assignees of the bankrupt or insolvent debtors should be made defendants, it would be necessary to make repeated searches in the offices where their papers would be filed, in the states, districts or counties where they resided. Even then there would

not be absolute safety, as there might be many changes in a remote state, such for instance as California, during the progress of a letter, containing the result of a search, to the place of its destination. Under such a rule there could not in many cases be any reasonable certainty for purchasers at sales in foreclosure suits. However regular all might appear from available sources of information, some prowling assignee, under an appointment made but a day before the decree of sale, might appear a year or two afterwards and tender the money due on the mortgage, and thus defeat the title of an innocent and indeed cautious purchaser altogether. But the evil would extend further; intended purchasers of real estates, in their investigations as to title, would often have to extend their inquiries beyond what have heretofore been considered as safe limits, and where a mortgage sale of recent date happens to be a link in the chain, might have to hunt all over the union to ascertain whether some defendant in the foreclosure suit had not, during its pendency, become a bankrupt or insolvent debtor, and made an official or other assignment of his estate to some one who had not been constituted a party. Inconveniences, it is true, form no reason for setting aside or disregarding a well settled rule. But where an exception to a thoroughly established rule, not called for by, but in opposition to, its letter, is claimed, the fact that it might be productive of great mischief, is sufficient to prevent its allowance. As we have not, at present, any bankrupt law, and as it may be doubtful whether an insolvent discharge in another state, or an assignment under it, would be efficacious in this, the evils resulting from such exception might now be somewhat limited, but they would nevertheless be very considerable, and would counteract what has hitherto been considered as one of the most benéficial effects of the statutory requisition to file a notice of *lis pendens* on the institution of a suit for the foreclosure of a mortgage of *real estate.*

Upon the whole I am satisfied that the equity of redemption of McKibben and Strong, and all claiming under them as purchasers, whose title accrued after the notice of *lis pendens* in the foreclosure suit was filed, including their assignee in bank

ruptcy, was effectually barred by the decree in that suit. It is therefore unnecessary that I should consider the other questions discussed at the bar.

The complaint must be dismissed, with costs.

[Kings Special Term, October 14, 1856. *S. B. Strong*, Justice.]

Wagstaff and others *vs.* Lowerre and others.

23 209
18h 197
24h 311
28h 631
39a 203
95a 538
101a 456

A testator, by his will, executed in 1824, bequeathed to his wife an annuity of $3000 during her life, to be paid out of the income of his estate. He also gave her certain personal property; which bequests were in lieu of dower. He then gave to each of his children, two sons and three daughters, $1000, to be paid to them, respectively, each year, until the division of his estate. The testator then devised his real estate as follows: one-fifth part thereof to his son David, in fee; one-fifth part to his son Alfred (the plaintiff) in fee; one other fifth part to his two sons and to F. upon trust, that upon the division of his estate they should either suffer his daughter Catharine to take, to her own use, during her life, the rents &c. of the said one-fifth part, or that said trustees should take and receive said rents, &c., and after deducting all costs, taxes, &c., pay over to said Catharine, during life, the net proceeds of said one-fifth part; and that upon her death the trustees should convey the said one-fifth part to her rightful heirs, share and share alike. The testator devised one other fifth part of his real estate to the same trustees, for the benefit of each of his other daughters, Ann and Sarah Louisa, upon the same trust, and with the like provisions. The testator made the same disposition of his personal estate which he had made of his real, viz: one-fifth part to each of his sons, to be paid to him upon the division thereof, and one-fifth to be paid to the same trustees, to be held by them upon the same trusts as were applicable to the real estate, for the benefit of each of his daughters. The testator directed that no division of his real or personal estate should take place until one year after the decease of his wife, and until one year after his youngest child should attain the age of twenty-one years. He also directed his executors and trustees, for the benefit of his estate, to let and ren out his real estate until such division should take place, and to invest his personal estate upon stocks, or security of real estate. The testator also directed that in case all or either of his daughters should marry, his executors should pay to each of them, out of that portion of his personal estate previously given to them in trust, the sum of $10,000; which sum, on a division of his estate, was to be deducted from the share or portion so given for

the benefit of said daughter; and that on the payment of said sum of $10,000 the annual payment of $1000 should cease, and in lieu thereof each daughter was to receive $300 each year until the division of the estate. The testator appointed his two sons, and F. executors. Previous to Sept. 5, 1828, David, one of the sons, died, leaving two children, and on that day the testator executed a codicil to his will, whereby he revoked the devises and bequests made to said David. He then gave to his son Alfred the part and share of his estate, real and personal, which had been given to David, with a provision that if Alfred should die without leaving issue, then such part and share should go to, and vest in, the surviving children. The testator died in Sept. 1828. His widow died on the 15th of March, 1854, and according to the terms of the will, the division of the estate was to be made on the 15th of March, 1855. Ann, one of the daughters of the testator, died, after the testator's decease, leaving a husband and children.

Held, 1. That under the codicil, Alfred was entitled to all that part of the estate given by the will to David, and which the latter would have taken if he had lived. That he was therefore entitled to the annual advance of $1000, given to David from the death of the testator until the division of the estate; that payment not being an annuity, but a rent-charge, descending to the heirs.

2. That it was the intention of the testator that his estate should remain in mass until the expiration of one year from the death of his wife, and until the youngest child came of age.

3. That the testator contemplated that there would be a surplus of rents and income beyond the payments directed to be made previous to the making of the division; and that it was his intention that any such surplus should be from time to time invested, and form a part of his personal estate, and be divided, finally, as such.

4. That if the intervening rents and income, from the death of the testator down to the time of the division, were in fact undisposed of, they fell into the residue of the real and personal estates respectively.

5. That the trusts respecting the shares of the daughters were legal and valid trusts; that they were not passive, but active; that they were not executed but executory trusts, and that the rule in Shelley's case had no application to them; but that they were saved by § 48 of the article of the revised statutes relative to uses and trusts.

6. That there was therefore no accumulation of the rents and profits to which Ann was entitled, on the division, and hence nothing which her administrator was entitled to receive. But that she was entitled to the income accruing from her share of the estate, real and personal, from the time of the division down to the time of her death.

7. That as to a portion of the real estate of the testator which had been taken by public authority, for public use, during the coverture of the testator's daughter Ann, the proceeds were to be regarded and treated as land, and not as money. But that whether land or personal estate, such proceeds, as to the three-fifths in which the daughters were beneficially interested, went to the

executors or trustees, in trust, and the daughters had only a life interest therein.

8. That the plaintiff was entitled to his commissions, as trustee, upon the real as well as upon the personal estate held by him in trust.

The law is well settled, in this state, that trustees, where nothing is said in the deed or instrument creating the trust, as to their compensation, are entitled to the same commissions as are allowed by law to executors and guardians.

In computing the commissions of a trustee, the amount of property held by him in trust is the proper basis of allowance; without making any distinction between real and personal estate.

THE complaint in this cause was filed for the partition and division of the estate, real and personal, whereof David Wagstaff died seised, and for a settlement of the accounts of the plaintiff as trustee and executor under the will of the said deceased. David Wagstaff, of the city of New York, being possessed of a large real estate, on the 7th of August, 1824, made and published his will in due form to pass real estate, whereby, after directing the payment of his debts, he bequeathed to his wife an annuity of $3000 during her life, to be paid out of the income of his estate, and he also gave to his widow certain personal property, and declared that said bequests were in lieu of dower. The testator then gave to each of his children, two sons and three daughters, an annuity of $1000, to be paid to them respectively, in each and every year, until the division of his estate should take place, as therein directed. He then gave several legacies, to which it is unnecessary to refer. The testator then disposed of all his real estate as follows: one-fifth part thereof, he gave to his son David Wagstaff, jun., his heirs and assigns forever; one-fifth part to his son Alfred Wagstaff, (the plaintiff,) and his heirs and assigns forever; one other fifth part to his two sons, and to Benjamin Ferris, upon trust, that immediately upon the division of his estate as therein provided, they should either suffer his daughter Catharine to take to her own use, during her natural life, the rents, &c. of said one-fifth part; or that said trustees should take and receive said rents, &c., and after deducting all costs, taxes, &c. pay over to said Catharine, during her natural life, the net proceeds of said one

fifth part of said real estate; and upon this further trust, that immediately upon the death of said Catharine, the said trustees should convey the said one-fifth part to the rightful heirs of said Catharine, share and share alike. The testator devised one other fifth part of his real estate to the same trustees for the benefit of his daughter Ann, upon the same trust, and with the like provisions. The testator also devised one other fifth part of his real estate to the same trustees for the benefit of his daughter Sarah Louisa, upon the same trusts and with the like provisions. The testator made the same disposition of his personal estate which he had made of his real, that is, one-fifth part thereof to his son David, jun., to be paid to him upon the division thereof; one other fifth part to his son Alfred, to be paid to him at the same time; one other fifth part to be paid to the same trustees, at the same time, to be held by them upon the same trusts, as applicable to the share of the real estate, for the benefit of his daughter Catharine; one other fifth part to be paid at the same time, to the same trustees, to be held by them upon the same trusts, as applicable to the share of the real estate, for the benefit of his daughter Ann; one other fifth part to be paid at the same time, to the same trustees, to be held by them upon the same trusts, as applicable to the share of the real estate for the benefit of his daughter Sarah Louisa.

The testator directed that no division of his real or personal estate should take place, until one year after the decease of his wife, and until one year after his youngest child should attain the age of twenty-one years. He also directed his executors and trustees, for the benefit of his estate, to let and rent out his real estate until such division should take place, and for the like benefit, to invest his personal estate upon stocks or security of real estate. The testator also directed, that in case all or either of his said daughters should get married, his said executors should pay to each of them, upon the happening of that event, out of that portion of his personal estate theretofore given to them in trust, the sum of $10,000; and which sum, on a division of his estate, was to be deducted from the share or portion so given for the benefit of said daughter; and that imme-

diately on the payment of the said sum of $10,000, the yearly sum of $1000, therein before given to the daughter receiving the same, should cease, and in lieu thereof said executors were to pay to each of said daughters respectively, the annual sum of $300, until the division of his said real estate. The testator appointed his two sons, and the said Benjamin Ferris, the executors of his last will and testament.

Previous to Sept. 5, 1828, David Wagstaff, jun., one of the sons of the testator, died, leaving two children, and on that day the testator made and published a codicil to his last will and testament, whereby he revoked and declared null and void the devises and bequests therein made to his son David Wagstaff, jun. He then gave to his son Alfred Wagstaff the part and share of his estate, real and personal, which by the will he had given to his deceased son, with a provision that if his son Alfred should die without leaving issue, then such part or share should go to and vest in his surviving children. The testator died on the 28th of September, 1828, and the will was duly proved on the 21th of November, 1828. On the 15th of March, 1854, Sarah Wagstaff, the widow of the testator, died, and according to the terms of the will, the division of the estate was to be made on the 15th of March, 1855. All the children and grandchildren of the testator were parties to this suit. Ann Craig, daughter of the testator, and wife of Benjamin D. K. Craig, had died, and letters of administration upon her estate had been granted to her said husband. A reference had been had to a referee, who had passed the accounts of the executor and testator, and a motion was now made for the confirmation of that report as a preliminary step to an actual partition of the estate, in accordance with the will of the testator.

On the part of the plaintiff it was objected, that as trustee, he was entitled to commissions on the real as well as the personal estate, the referee only having allowed him commissions on the personal estate, and on the receipts and payments made by him. He contended, that on a transfer of the estate out of his hands, he was entitled to his commissions as trustee, on the value of the whole estate, and not on a part only. On the

part of all the defendants, it was contended that the gift to David of $1000 was personal to him, and did not pass to the plaintiff by the codicil. On behalf of the defendant Craig, it was contended that the devise of one-fifth of the real estate to the plaintiff, vested the same immediately in him in fee, on the death of the testator; that the same result obtained as to the share originally given to David; that no directions were given to the executors to let the real estate until the division, nor any disposition made of the rents, and that they therefore went to the owners in fee, and that it followed that the plaintiff took his share and that of David, in the rents and profits from the testator's death. It was also contended, that the daughters each took their shares in fee, and that the intervention of trustees did not alter the case; that the trust was passive and not active, and therefore the estate vested absolutely in each daughter. That the administrator of Mrs. Craig was entitled to the rents and profits of her share, which should have been paid to her during her life; that the same rules were to apply to the personal estate, and the disposition of the income thereof; that the proceeds of lands taken by the constituted authorities for public use, were to be treated as personalty, and, if disposed of by the will, followed the principles to be applied to the personal estate. That if not disposed of by the will, the statute of distributions applied, and each child was to have one-fifth, and the share of Mrs. Craig was to be paid to her administrator.

J. F. Mitchell and *B. D. Silliman*, for the plaintiffs.

John Anthon, for the defendant Craig and his children.

William Lowerre, for himself and wife.

J. Coit, for the infant defendants.

B. F. Dunning, for the defendants Schieffelin and wife.

Davies, J. A careful examination of this will, and the authorities cited on the argument, has led me to the conclusion

that the report of the referee in this case is correct, and should be confirmed, with a single exception.

It appears to me that there can be no serious difficulty in ascertaining the intent of the testator in reference to the disposition of his estate; and when that can be gathered, the principle is too familiar to need authority to sustain it, that that intention must govern. At the time the will was made, the testator had a wife and five children, who, he anticipated, would survive him. He first makes provision for the payment to his wife of a sum annually, deemed by him adequate to her support, and he then directs his estate to be divided into five parts or shares; and he gives, absolutely, one share to each son, and to trustees one share to hold for each daughter. He directs that his estate shall remain undivided until one year after the death of his wife, and until his youngest child should attain the age of twenty-one years. The youngest child having attained that age before the death of his wife, the division was to take place on the 15th of March, 1855, being one year after her death. The testator directed that until such division there should be paid out of the income of his estate the sum of one thousand dollars in each year, to each of his children. On the division, the share of the sons was to vest absolutely in them, and the share of the daughters vested in trustees, during their lives, and the rents, profits and income were to be paid over to them. By the codicil, the part and share of the estate of the testator given to David, was given to his brother Alfred, the plaintiff. I think, that under this section of the codicil, the plaintiff is entitled to all that part of the estate given by the will to David, and which the latter would have taken if he had lived. I do not see why his right to this annual advance of $1000 until the division of the estate, (and which David would certainly have been entitled to if he had lived,) is not just as fixed and certain as is his right to the residue of the share of David. The annual payment is but an advance or anticipation of a portion of the share, it is in fact a part of the share, and a devise of the share necessarily carries with it a disposition of all parts of the share and of its product. It is contended, that

the testator obviously intended to place all his children on an equality, and that this construction would give to the plaintiff an annual payment double that of either the other children. But the answer to this is obvious. True it is, that the testator originally started with the idea of placing each of his children on an exact equality, in the disposition and enjoyment of his estate, except that, when the division took place, the sons were each to take their share absolutely, while the share of each daughter was to be held in trust, and the income only to be paid over to her during her life; yet we see that, on the death of David, the testator manifested a clear intention to change this equality, by making the share of the surviving son double that of each daughter. He might have thought the provision for the daughters entirely adequate, and that those who survived him, bearing his name, should take all that he intended for any one of his name. It was earnestly urged on the argument, that this payment to David was an annuity, and ceased upon his death, and that, therefore, it was not in existence to pass by the codicil. It should be observed, that this advance or payment is nowhere styled by the testator an annuity; it is not to be paid during their lives, but a specific sum in each year until the division of the estate. It is a gift of the sum of $1000 for each and every year until the division of the estate, and, in this case, it amounted to the sum of $28,000. The general understanding of the meaning of the word annuity is, that it is an annual payment for the support of the recipient; and that it terminates with his life. That it is dependent for its existence on the life of the annuitant. By this test, the provision of $1000 in each year for David, until the division of the estate, cannot be regarded as an annuity. It, in fact, is not an annuity in a legal sense. "An annuity is a yearly sum of money granted by one party to another in fee for life or years, charging the person of the grantor only." (1 *Bouv. Law Dic.* 104. *Co. Litt.* 144 *b.* 2 *Bl. Com.* 40. 3 *Kent*, 460.) An annuity is different from a rent charge, with which it is frequently confounded, in this—a rent charge is a burden imposed upon and issuing out of lands, whereas an annuity is charge-

able only upon the person of the grantor. (*Bac. Abr. Annuity A.* 1 *Bouv. Law Dic.* 104.) This is a rent charge and descends to the heirs. And it is apparent that it was so regarded by the framer of the testator's will. It is therein directed, that, in case any of his said children, either before or after his decease, should die leaving lawful issue him or her surviving, such issue shall have and take the share or proportion his or her parent would have been entitled to if living. It seems thus to be the clear intention of the testator, that whatever was given by the will to the parent should, in the event of the death of the latter, go to the child or children; and it is equally clear, in my opinion, that if no alteration had been made in the will, the children of David would have taken all that was given to him; that is, the $1000 in each year until the division of the estate, and then the one-fifth part of the real and personal estate. I am well satisfied, that the same rights which the children of David would have had under the will, if it had not been changed, passed by the codicil to the plaintiff, and that the report of the referee is correct in allowing him the $1000 as part of David's share, from the death of the testator until the division of the estate.

There can be no question that it was the intention of the testator, that his estate should remain in mass until the expiration of one year from the death of his wife, and until the youngest child came of age. The executors were to rent the real estate and invest the personal, and from the receipts make the payments directed by the will until the division should take place. The testator contemplated, what might naturally take place, that there would be a surplus. His children were to receive only until the division, the annual sum directed by the will. What was to be done with this surplus, if any, until the division? I think this question is answered by the directions of the will. The real and personal estate were to be rented and invested until the division, *for the benefit of the estate;* and this provision, taken in immediate connection with the provision that no division of the estate should take place until the happening of the event upon which it depended, and the pro-

vision as to payments to the children until such division, satisfy my mind that it was the intention of the testator that any such surplus should be from time to time invested, and form part of his personal estate, and be divided finally as such. I have been unable to see that these conclusions conflict with any of the cases cited on the argument. On the contrary, it seems to me that these directions are strictly legal and fully sustained by authority.

If the intervening rents and income, from the death of the testator up to the time of the division, are in truth undisposed of, they fall into the residue of the real and personal estates respectively. (*Duke of Bridgewater* v. *Egerton*, 2 *Ves.* 121. 4 *Kent's Com.* 284. *Bryan* v. *Knickerbacker*, 1 *Barb. Ch. R.* 409.) I think these cases show that if the directions to invest or accumulate the rents and income of the estate, for the benefit of the estate, are not sufficiently explicit, then the executors were bound, as well in accordance with the will of the testator, as in accordance with well settled legal principles, to retain and invest the annual surplus for the estate, and the same must now be divided as part of the real and personal estate.

The learned counsel for the administrator of Mrs. Craig earnestly contended that the trusts created in reference to the shares of the daughters, were passive and not active trusts; that the title of each daughter in the respective share given to her, vested absolutely her share in her; that the rule in Shelley's case was applicable, and that the first taker took the fee. As authority for this, the counsel cited 1 *Coke*, 104; 4 *Kent*, 214; *Schoonmaker* v. *Sheely*, 3 *Hill*, 165; *Lalor on Real Estate*, 97, 75; 2 *R. S.* 11, § 28. These cases illustrate the application of the rule in Shelley's case, and, if the trust created by this will be a passive one, would be controlling. Chancellor Kent says the rule in Shelley's case is equally applicable to conveyances of the legal estate, whether by will or by deed, though there is more latitude of construction allowed in the case of wills, in furtherance of the testator's intention. (4 *Kent's Com. 7th ed.* 226.) To maintain the proposition that the trusts created by this will are passive, and not active, the same coun-

sel relies upon *Frazer* v. *Western*, (1 *Barb. Ch. R.* 238.) There the deed conveyed the premises to the trustees upon a mere naked trust; in the first place for the use and benefit of Mary Collins, and her heirs and assigns forever. It then contained the further trust that the trustee should convey the premises to such person or persons as she should by will or by her certificate in writing during her life, and after the death of her husband, designate, and if no such last will and testament should be made, or certificate given, then to convey the premises to her heirs, after her death. In this case the chancellor says, "The trustee then, even before the revised statutes, held the premises as a mere naked trustee of the legal estate, and with a bare power to convey to her devisee, grantee or heirs, either during her life or afterwards. I think, therefore, that the equitable interests of Mrs. Collins were turned into a legal estate in fee in the premises, by the operation of the forty-seventh section of the article of the revised statutes relative to uses and trusts, (2 *R. S. p.* 13,) especially after the death of the husband. That section provided that every person who by virtue of any grant, assignment or devise, then was or thereafter should be entitled to the actual possession of lands and to the receipt of the rents and profits thereof, in law or in equity, should be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest. The next section, however, declared that the preceding section should not divest the estate of any trustees in any trust then existing, where the title of such trustees was not merely nominal, but was connected with some power of actual disposition or management, in relation to the lands which were the subject of the trust. The object of this last section, undoubtedly, was to preserve the legal title in the trustees, in trusts which had already been created, whenever and so long as the continuance of such legal title in them was necessary to carry into effect any of the objects of the trusts, and when such objects could not be carried into effect if the whole legal title was immediately vested in the *cestui que* trust." This decision was affirmed in the court of errors. (*See* 3 *Denio*, 611.) This case would be controlling,

provided the provisions of the will now under consideration were analogous. The trustees do not hold merely nominally the title of these *cestuis que trust*, unconnected with any power of disposition or management. On the contrary, they are expressly directed in reference to the real estate, "to take and receive the rents, issues and profits thereof, and after deducting therefrom, from time to time, all and every sum or sums of money which they or any of them shall have paid for the taxes, assessments and repairs of the said premises, to pay the net proceeds of such rents and profits unto his said daughter" for and during her natural life, and on her sole receipts, and upon the death of such daughter, to release and convey the said share to her heirs. The trust created in relation to the personal estate, is to place the share of each daughter out at interest on real securities, or invest the same in the public stocks, and pay the interest, dividend or income thereof to his said daughter during her natural life, and immediately upon her death to transfer and pay over the same to her heirs at law. It is thus most apparent that these trusts are not passive but active; not, in the language of § 48, "merely nominal," but are connected with a power of management. They do not, therefore, fall within the provisions of § 47, and are not, consequently, prohibited by it. But if any doubt remained as to the character of these trusts, I think it must be removed by an examination of the case of *Brewster* v. *Striker*, (2 *Comst.* 19.) The facts in that case are briefly these: John Hopper, deceased, in 1815 made his last will and testament, whereby he devised to his three grandchildren and their heirs forever, all his real estate, the same to be disposed of as follows: The said real estate was not at any time thereafter to be sold or alienated, but his said executors, or the survivor of them, were from time to time to lease or rent the same as they might deem most advantageous to the heirs, and such rents to be annually paid by the executors to the heirs in equal portions, and if either of said heirs chose to occupy any part of said real estate, he or she was to have the preference over any other applicant, paying rent for the same. This case was ably argued by the most eminent counsel, and the opinion of the court was

delivered by the late Chief Justice Jones. After fully and carefully considering all the objections urged to the provisions of this will, on page 38, he says: "In my view of them, the powers conferred on the executors were not simply leasing powers, or powers in trust in the legal sense of those terms, *but an active trust*, intended to operate upon the estate, and requiring an interest in the land, and the legal title in the executors to the premises, over which they are to be exercised, in order to enable them to execute the same, and fulfill the duties thereby imposed upon them; that consequently the testator's real estate, when his death occurred, by implication of law vested in the executors, and the grandchildren had no legal title thereto, but the beneficial estate and interest only therein." In the case now under consideration the estate was granted in absolute terms to the executors, and is not left to implication, as in the case of *Brewster* v. *Striker*, *supra*. The case of *Wood* v. *Burnham*, (6 *Paige*, 513,) is in point. In that case, the testator devised his residuary estate, real as well as personal, to his executors upon trust, to receive the rents and profits, and divide the same among his children, and at the expiration of six years to divide the estate among the children of the testator, and, if any had died, to their lawful issue then living. And the executors were directed to convey the same by a fit and competent deed. The chancellor says, on page 518, "The devise to the executors in this case being an executory, and not an executed trust, or, in the language of one of the English chancellors, the testator having directed his executors to make conveyances of the estate to the *cestui que trust*, instead of being his own conveyancer, by vesting either a legal or equitable estate in his children and their heirs directly, it forms an exception to the rule in Shelley's case." This last case takes the position that the fact that the executors are to convey the estate, makes the devise executory, and therefore, the rule in Shelley's case does not apply.

It was contended on the argument that this was a passive trust, because, by the terms of the will, the *cestuis que trust* were themselves "to receive and take to their own use and benefit," during their lives, the rents, issues, and profits of the one-

fifth of the real estate, devised in trust for them respectively. But it should be remarked, that this could only be done in the discretion of the trustees or executors, and if they had permitted it, the *cestui que trust*, in such receipt, must be regarded as acting as the agent of the trustees. I am of the opinion that the trusts created by this will are legal and valid trusts; that the same are not passive, but active; that they are not executed, but executory trusts, and that the rule in Shelley's case has no application to them; but that the same are saved by § 48 of the revised statutes, supra. It follows as a deduction from these premises that there was no accumulation of the rents and profits to which Mrs. Craig was entitled on the division, and, therefore, nothing which her administrator was entitled to receive. The income accruing from her share of the estate, real and personal, from the time of the division, March 15, 1855, up to the time of her death, she was entitled to, and if not paid to her or allowed to her administrator by the referee, must now be so allowed and paid to him.

A considerable portion of the real estate of the testator has been taken by public authority for public use, and it is alleged that this has worked a conversion, turning the real into personal estate, and that the same must be disposed of according to the statute of distributions. If such a conversion had taken place, I do not see how it is to aid the administrator of Mrs. Craig. If it be personal estate of the testator, it is equally to be held in trust; and she was only to be entitled to the income of one-fifth during her life. The case of *Graham* v. *Dickinson*, (3 *Barb. Ch.* 169,) is relied on to sustain the position, that the proceeds of the lands taken are to be regarded as personal estate, and, on the death of the wife, go to her representatives, and not to her heirs at law. The chancellor certainly does hold, in that case, that the real estate had been converted into personal, and that, on the death of the wife, her share reverts to her administrator. The case of *Sweezy* v. *Thayer*, (1 *Duer*, 286,) is relied upon as qualifying the decision in *Graham* v. *Dickinson*. I understand the latter case as holding that when the conversion takes place during coverture or infancy, the su-

plus or proceeds will not be treated as money, and will not be distributed as such, but the same will be regarded as land, and go to the heir at law. If any conversion took place here, it was during the coverture of Mrs. Craig, and this case is authority for holding that the proceeds are to be regarded and treated as land. In either view of this point, I do not see that it is material to the parties; as, whether land or personal estate, it equally, as to the three-fifths, in which the daughters are beneficially interested, goes to the executors or trustees in trust, and they have only a life interest therein.

The only remaining question to be disposed of is that of the claim of the plaintiff to commissions upon the real estate, of which he has had the care and management for near thirty years. In his hands and under his watchful superintendence, and by his skill and good judgment, it has been preserved and protected, until it has become an estate of great magnitude, and giving to each heir a large fortune. The claim of the executor commends itself as just and reasonable, and if it is sustained by principle and authority, ought to be allowed. The English court of chancery did not and does not allow compensation to trustees, executors, &c., unless the same is given expressly or by implication, by the deed or will creating the trust. (*Lewin on Trusts*, 438.) The same rule obtained in this state until the passage, in 1817, of the act giving commissions to executors and administrators. (*L. of* 1817, *p.* 292.) This act authorized the chancellor, on the settlement of the accounts of guardians, executors and administrators, to make a reasonable allowance to them for their services as such, over and above their expenses, and such rate when settled by him was to be conformed to in all cases. In compliance with this statute, the chancellor, on the 16th of October, 1817, made an order that the compensation to guardians, executors and administrators, should be, for receiving and paying out money, on all sums not exceeding $1000, five per cent; two and a half per cent on all sums exceeding $1000 and not exceeding $5000; and on all sums above $5000, one per cent. (3 *John. Ch.* 630.) The English rule was discussed and adhered to by Chancellor Kent, in *Green* v. *Winter*, (1 *John. Ch.* 37.) The

chancellor there allowed the trustee four dollars a day "for his time and expenses," on the ground of a fair indemnity, but adhered inflexibly to the English rule, not to allow a compensation to trustees for their services. He cites with approval the remark of Lord Hardwicke in *Aycliffe* v. *Murray*, (2 *Atk.* 58,) "that chancery looked upon trusts as honorary, and a burden upon the honor and conscience of the trustee, and *not* undertaken upon mercenary motives, though a fair and open bargain with the *cestui que trust* for compensation would be admissible." The doctrine of this case is reaffirmed in *Manning* v. *Manning*, (1 *John. Ch.* 527.) In the latter case Chancellor Kent enters upon a very elaborate discussion of the principles and reasons applicable to such allowances, and reviews all the authorities relating to the subject. He arrives at the conclusion, both upon principle and authority, that no allowance for compensation could be made. This decision was in September, 1815. After the act of 1817, Chancellor Kent held that a committee of a lunatic came within the equity of that act, and allowed to him commissions according to it; and the rate thus fixed by the chancellor was, a few days after, adopted as the compensation for guardians, executors and administrators. (*In the matter of Roberts, a lunatic*, 3 *John. Ch.* 43.)

The question as to compensation to trustees generally, does not appear to have been judicially passed upon in this state until 1832, when Chancellor Walworth, in *Van Rensselaer* v. *Bayard*, and *Denniston* v. *Bleecker*, (not reported, but referred to by him in *Meacham* v. *Sternes*, 9 *Paige*, 398,) was of the opinion that compensation, similar to that allowed to executors, &c. should in all cases be allowed to trustees. In the latter case, he held that such compensation was proper to be paid to trustees for their services, and such has ever since been regarded as the well settled law of this state. In other states, it is now held that trustees are entitled to such compensation, as within the equity of their statutes giving compensation to executors, or because they do not regard the English rule withholding compensation as just and equitable. (*Granberry* v. *Granberry*, 1 *Wash.* 250. *Miller* v. *Beverley*, 4 *Hen. & Munf*

116. *Prevost* v. *Gates*, 3 *Wash. C. C. R.* 434. *Kendall* v. *New Eng. Co.*, 13 *Conn. R.* 383. *Ringgold* v. *Ringgold*, 1 *H. & Gill*, 11. *Windner* v. *Diffenderffer*, 2 *Bland*, 199. *Boyd* v. *Hawkins*, 2 *Dev. Ch.* 195. *Cheray* v. *Wendell*, *Walk. Ch.* 267.) The rate of compensation is not uniform in the different states; it is fixed according to the circumstances of each case, the amount of the trust, and the nature and value of the services. In the case of *Meacham* v. *Stears*, (9 *Paige*, 398,) Chancellor Walworth applied the rule of the statute in cases of executors and administrators. He says: "It may, therefore, be considered the settled rule, so far as the decision of this court can settle it, that *in all cases* of trusts of this description, and all other express trusts of a similar nature, where nothing is said in the deed or instrument creating the trust, on the subject of compensation to the trustee for his personal services in the execution of the trust, and where there is no agreement on the subject for a different allowance, that the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians, and to be compensated in the same manner." In that case, the chancellor allowed commissions to the assignee, upon funds which, in fact, he had not collected, but with which he was charged; and also commissions upon debts due from the assignors to himself, and which he had applied in satisfaction of a debt due to him; and also, commissions upon the balance found due by him, and which by the decree he was directed to pay over.

It seems to have been supposed by the referee that the trustee in this case is limited to his commissions on that part of the estate which has become personal property, and this, doubtless, has arisen from assuming such to be the intent of the statute, in the case of executors and administrators. The statute alludes to personal estate, simply because that is all executors and administrators have in charge. In reference to them, the statute allows commissions "on all sums of money" that they may receive and pay out. (2 *R. S.* 93.) But commissions on the whole amount of the trust estate in their hands, under their

control, and managed by them, was intended, and has been uniformly allowed, even though a very small part was in money actually received or paid out. If the estate of the deceased consisted of stocks, or bonds and mortgages, it might be and often is the case, that the executor actually receives and pays out only the interest or income; yet he would be entitled to and does receive his commissions upon the whole amount of the estate. The compensation is given to him for his care and management of the estate, and not for the simple act of receiving and paying out. And I am unable to see, why the trustee, in this case, should be restricted to his commissions upon the sums of money he receives and pays out, and the personal property which he transfers. The reasons for his compensation apply, in my judgment, with greater force even, in regard to real estate than personal. The responsibility and difficulty of managing a trust estate, consisting of stocks and bonds and mortgages, are far less than that consisting, like the present, of unproductive real estate, lying in the suburbs of a large and growing city. This property has been subject to the system prevailing here, of local improvements, by opening streets and avenues, regulating and paving streets, constructing sewers, and other like operations. It has always been subject to annual taxation, and constant watchfulness is required to save property thus circumstanced from total loss and confiscation. That attention seems to have been given to this estate by the present trustee, and I can see no justice in requiring him to have rendered these services gratuitously, for a period of near thirty years. If any portion of this estate had been lost through his inattention and negligence, he would have been charged therewith. Can any thing be more equitable than that he should receive a compensation for services faithfully rendered in its preservation? No faithful and competent agent could have been hired to render the services performed by this trustee for the amount allowed on the rate paid to executors, &c. In the matter of *De Peyster*, (4 *Sand. Ch.* 511,) Vice Chancellor Sandford held that "as to houses and lots, the argument is strong that they fall within the equity of

the statute, and that there is no well grounded distinction between lands and stocks as to the trustees' compensation." In *Mc Whorter* v. *Benson*, (*Hopk. R.* 42,) Chancellor Sanford says, "The amount of property confided to an executor, administrator or guardian, *and passing through his hands*, is a basis upon which his reward may be easily computed. The custody and care of the estate are his duty, and his services in general bear a just proportion to the amount of the estate. Though the value of his services may not be in exact proportion to the value of the estate, yet in the general course of these affairs, *the amount of the estate* indicates, with sufficient exactness, the extent of his labors, cares and services, and their reasonable value. Thus a plain rule of calculation is afforded *by the amount of the property* held in trust; a rule which is comprehensive as well as simple, and which, in all ordinary cases, is a very just criterion of the reasonable value of the services of the trustee. This rule is recommended by its absolute certainty, its intrinsic propriety, its adoption in other states in which compensation is allowed to these trustees, its analogy to compensation made to other trustees and agents, who have the care of property, and by the justice which it will generally afford to an executor, administrator or guardian." I must, therefore, regard "*the amount of property held in trust*," as the proper basis of allowance to the trustee, and "that there is no well grounded distinction between lands and stocks, as to the trustees' compensation."

I believe that I have now disposed of all the questions raised on the argument of this cause, and have arrived at such conclusions as much reflection and such examination as other claims to my time have permitted.

A decree will be prepared on the principles here settled and for a partition according to the terms of the will; the shares of the surviving daughters to be assigned to trustees to hold upon the trusts of the will; the shares of the plaintiff to be transferred to him, and that belonging to the children of Mrs. Craig to be transferred to such as are adults, and the shares of the infants to be deposited with the United States Trust Company

until they severally attain their majority; the income of their respective shares to be paid to them during their minority.

The costs of all the parties to this suit, with a reasonable allowance, will be paid out of the funds of the estate.

[New York Special Term, October 15, 1856. *Davies*, Justice.]

Walter *vs.* Lockwood.

23 228
28 248
37 356
7h 277
11h 618

In an action under the code, to recover the possession of real estate, the complaint is sufficient if it states that the plaintiff has the lawful title, as the owner in fee simple, to the premises described therein, and that the defendant is in possession of the premises, and unlawfully withholds possession of the same from the plaintiff, and the plaintiff demands that the defendant may be adjudged to surrender the possession to him, and to pay damages for the unlawful withholding of the same, &c.

Lawrence v. *Wright*, (2 *Duer*, 673,) overruled.

THIS was an action brought to recover the possession of certain real estate. The action was tried before a referee, who dismissed the complaint and rendered judgment against the plaintiff for costs, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The following is a copy of the complaint. "The complaint of the above named John Walter, plaintiff, respectfully shows this court that he has lawful title as the owner in fee simple to the following described real estate, situate in the village of Watkins, county of Schuyler, and state of New York, and bounded as follows," &c. "It being the equal south half part of a certain lot of land purchased by the said party of the first part of Samuel Watkins, and his wife Cynthia Ann, on the tenth day of May, in the year one thousand eight hundred and fifty-two, as by reference to the deed thereof made by the said Samuel Watkins and his wife, will more fully appear. And that the said defendant is in possession of the said real estate above described, and unlawfully withholds possession of the same from the said p aintiff, wherefore the said

plaintiff demands that the said defendant may be adjudged to surrender the possession of said real estate to the said plaintiff, and to pay said plaintiff damages for the unlawful withholding of the same, and for the rents and profits thereof to the sum of five hundred dollars, besides costs."

Judgment having been entered in favor of the defendant for costs, the plaintiff appealed to this court from the judgment.

B. F. Gibbs, for the appellant. I. All *forms* of pleading heretofore existing are abolished, and the rules, by which the sufficiency of pleading is to be determined, are those prescribed by the code. (*See* § 140.) The complaint must contain a plain and concise statement of the facts constituting the cause of action. (§ 142, *sub.* 2. *Fay* v. *Grimsteed*, 10 *Barb.* 321.) The words "facts constituting cause of action," in § 142 of the code, mean those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts. (*Wooden* v. *Strew*, 10 *How. P. R.* 48.) This mode of pleading in an action of ejectment has never been disapproved, but on the contrary is impliedly held sufficient in 2 *Kernan*, 580; 12 *Barb.* 481, 486, *and* 9 *id.* 219, 226.

II. It is sufficient for the purpose of pleading, if a complaint establish a *prima facie* cause of action. It is not necessary to anticipate for the purpose of noticing and removing every possible exception, answer or objection that may exist. (1 *Chitty's Pl.* 222.)

III. *Facts* only are to be stated and not arguments, inferences, or matters of law. (1 *Chitty's Pl.* 214.)

IV. The complaint in this action is good. It sets forth the *facts* constituting the "cause of action," and not *evidence* of those facts. This is enough. (1 *Monell's Pr.* 363, *and ante. Garvey* v. *Fowler*, 4 *Sandf.* 665.)

V. The pleadings must contain *issuable* facts *essential* to the cause of action or defense, and not those facts and circumstances which go to establish such essential facts. (*Howard* v. *Tiffany*, 3 *Sandf.* 695. *Mann* v. *Morewood*, 5 *id.* 557. *Glenny* v. *Hitchins et al.* 4 *How.* 98. *Shaw* v. *Jayne et al. Id.* 119.

Knowles v. *Gee et al. Id.* 317. *Millikin* v. *Cary et al.* 5 *id* 272. *Williams* v. *Hayes, Id.* 470. *Rens. & Wash. P. R. Co.* v. *Wetsel,* 6 *id.* 68. *Wooden* v. *Waffle, Id.* 145. *Boyce* v. *Brown,* 7 *Barb.* 80. *S. C.* 3 *How.* 391. *Fay* v. *Grimsteed,* 10 *Barb.* 321.) The criterion in every such case is whether the allegations in question can be made the subject of a *material* issue. (5 *How.* 470.) If the complaint contain these it is good. As to what is *material* issue, *see* 1 *Chitty's Pl.* 653, *h.; Gould's Pl ch.* 6, § 26.

VI. A demurrer, (or an objection in the nature of a demurrer,) to a complaint, founded on the sixth subdivision of § 144 of the code, applies only to such defects as would render the complaint bad on a general demurrer at law, or bad for want of equity, in chancery. (*Richards* v. *Edick,* 17 *Barb.* 260.) A complaint to be overthrown by a demurrer (or an objection in the nature of a demurrer,) must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. (*Richards* v. *Edick,* 17 *Barb.* 270.)

VII. Inferences and conclusions of law are the province of the court, and not of the pleader; the complaint should state facts alone. (*Boyce* v. *Brown,* 7 *Barb.* 80; *S. C.* 3 *How.* 391. *Mann* v. *Morewood,* 5 *Sandf.* 557.) An averment that the plaintiff is entitled to the possession of premises described in a complaint, is a conclusion of law from the fact of title as the owner in fee simple, and is therefore, inadmissible.

VIII. In all real property actions, brought under the code, the law of the case is to be governed by the revised statutes; the practice, by the present mode of procedure. (1 *Whitt. Pr.* 410.) In the action of ejectment under the code, all the old formalities on the subject are entirely swept away, and the action must hereafter be conducted in strict accordance with the new practice, the remedy for mesne profits being joined in the same proceeding. (1 *Whitt. P.* 410. 1 *Code Rep* 19.) An averment setting forth the fact that the plaintiff has lawful title, as owner in fee simple, to certain described premises, is a suffi-

cient averment of possession, because in the absence of any other title, it is a conclusion of law, that *prima facie*, he has the right of possession. *Title* in *fee simple*, being the highest and most perfect estate that can be had in land, it is unnecessary for the pleader to aver, that no other or lesser estate exists, which precludes a plaintiff's right to the immediate possession. If there be such intermediate estate, it is mere matter of defense, which the plaintiff is not bound to anticipate.

Wood & Jamison, for the defendant. The complaint in this action is insufficient, and does not state facts sufficient to constitute a cause of action. I. The code requires the complaint to contain "a plain and concise statement of the facts constituting a cause of action." (*See Code*, § 142, *sub.* 2; *also*, 2 *Duer.* 673.) The only allegation in this respect, (or which can be said to be a statement of facts,) contained in the complaint, is "that the plaintiff has lawful title, as the owner in fee simple, to the following described real estate, situated, &c. and bounded as follows." This is no more nor less than an allegation or conclusion of law, and is not a statement of the facts, out of which the title of the plaintiff or the cause of action arose. The words, "as the owner in fee simple," do not add to or give effect to the complaint, in the least, for they do not amount to an allegation that the plaintiff is the owner, in fee simple, of the premises in question, being in *effect* only an allegation that the plaintiff *has lawful title* to the premises in question, instead of his being the owner in fee simple of the same. (2 *Duer*, 670, 673, 349.)

II. The complaint does not allege that the plaintiff is entitled to the possession of the premises in question. The action of ejectment is an action for *the possession*, and the complaint should state facts showing, not only the title of the premises, but the right to the possession to be in the plaintiff at the time of the bringing of the action. The complaint should contain such a statement of facts, that if proved or admitted, the court could give the judgment demanded. (*Tallman* v. *Green*, 3 *Sandf.* 438.) If the defendant should admit, in open court, that the plaintiff has lawful title to the premises in question, it would

not entitle him (plaintiff) to a judgment for the possession, for the reason that he no where alleges that he is entitled to the possession. (*Code*, § 142, *sub.* 2.)

III. The complaint should either have alleged facts showing a regular paper title, or actual possession in the plaintiff or grantor. (1 *Comst.* 529.) If the allegation that the property had been conveyed to the plaintiff would not be sufficient to show title, we cannot see how the sole allegation that the plaintiff has "*lawful title*," to the premises can be sufficient. (*Gardner* v. *Heart*, 1 *Comst.* 529. *Lawrence* v. *Wright*, 2 *Duer*, 673.) It was held that in an action under the code, to recover the possession of real estate, *the facts* set forth in the complaint must show that the plaintiff has a legal title to the premises in question. The mere averment that he has such title is insufficient. "Facts constituting a cause of action, or a defense, in the sense of the code, are physical facts, capable of being established by oral or documentary proof, and are not propositions which are true in law."

IV. The complaint is insufficient under the revised statutes. "The complaint must allege that *on a day to be named* after his title accrued, the plaintiff was possessed of the premises in question—describing them—and that being so possessed, the defendant afterwards, on some day *to be stated*, entered into such premises and unlawfully withholds from the plaintiff the pos session thereof." (2 *R. S. 4th ed. p.* 566, § 7.) "The general provisions of the revised statutes relating to actions concerning real property shall apply to actions brought under this act." (*Amended code*, § 455.) And the general provisions of the revised statutes for the recovery of real property as to what a complaint shall contain are still in force. The complaint in this case does not even allege that on *any certain day* the plaintiff was possessed of the premises in question, nor does it allege that the defendant, while in possession of the same, at any *particular time* entered into such premises, except the allegation, "and that the defendant is in the possession of the said real estate above described," which is not sufficient to comply even with the revised statutes. (*Amended code*, § 455. 2 *R. S. 4th*

ed. p. 566, § 71.) In a declaration in ejectment the averments of title must be of a day subsequent to the accruing of the title of the plaintiff, and the ouster. (*Siglar* v. *Van Riper*, 10 *Wend.* 414.)

MASON, J. When actions had names, this would have been known as an action of ejectment. The cause was tried before a referee, who nonsuited the plaintiff, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The complaint states that the plaintiff has lawful title as the owner in fee simple to the following described real estate in the village of Watkins, county of Schuyler, and state of New York, and then gives the boundaries and description. The complaint then states that the defendant is in possession of the said real estate, and unlawfully withholds the possession of the same from the said plaintiff. Wherefore the said plaintiff demands that the said defendant may be adjudged to surrender the possession of said real estate to the said plaintiff, and pay the said plaintiff damages for the unlawful withholding of the same to the sum of $500, &c. This is a good complaint, either under the code or the revised statutes. It is a good complaint under the strictest rule of the code. It contains a plain and concise statement of the facts constituting the plaintiff's cause of action. The facts constituting the plaintiff's cause of action in this case are, that he has lawful title as owner in fee simple to these premises, and that the defendant is in the possession and unlawfully withholds the possession thereof from him. I can see no sense in requiring the plaintiff, after he had stated in his complaint that he was the owner in fee simple of these premises, and had lawful title thereto, and that the defendant was in possession and unlawfully withheld such possession, to go on and state that the plaintiff was entitled to the possession. The allegation that the plaintiff is the owner in fee simple and that the defendant is in possession and unlawfully withholds the possession thereof from the plaintiff, necessarily presents this very issue. The defendant could not unlawfully withhold the possession from the plaintiff, unless the plaintiff was entitled to the

possession. It has been thought by the profession quite generally, and by the referee in the case at bar, I have no doubt, that the case of *Lawrence* v. *Wright*, (2 *Duer*, 673,) conflicted with the views which I have taken of the complaint in the case at bar. The complaint in the case of *Lawrence* v. *Wright* averred that the premises were conveyed by Pierce to the plaintiff by a warranty deed, and that by virtue of that conveyance the plaintiff was seised of the premises, and had a lawful title thereto, &c.; and upon demurrer the court held the complaint bad. If I deemed it indispensable to a decision of the case at bar to complain of the case of *Lawrence* v. *Wright*, I should feel myself bound to condemn that case, and vote for its reversal. And if the doctrine which seems to be thrown out by the judge in that case is sought to be impressed upon us here, I am not prepared to submit to it. The idea that in an action of ejectment under the code, the plaintiff must go on and state the facts which prove or establish that he is the owner in fee simple and has the legal title, is to my mind simply an absurdity. This would require him to state the evidence, in detail, by which, when he came to the trial, his case was to be proved. There is no rule better settled, under our present system of pleading, than that the party is not permitted in his pleading to state the evidence which goes to establish the facts of his case, but must be content with a plain and concise statement of the facts. This is too well settled to require a reference to the cases.

The defendant's answer in this case consists simply of a denial of each and every allegation in said complaint contained. Now what is the issue? The plaintiff alleges that he has lawful title, as owner in fee simple, to these premises. This is denied by the answer, and a perfect issue is made upon the plaintiff's title. The plaintiff alleges that the defendant is in the possession of the premises, and unlawfully withholds the possession thereof from him. This the defendant denies, and a perfect issue is formed, both as to the fact whether the defendant is in possession, and whether he unlawfully withholds that possession from the plaintiff. The judgment must be reversed and a new trial granted, costs to abide the event.

BALCOM, J. This action was brought to recover the possession of a lot of land situate in the village of Watkins, in the county of Schuyler. The action was tried before a referee, who dismissed the action on the ground that the complaint does not state facts sufficient to constitute a cause of action. Judgment has been entered in favor of the defendant for costs. I am of the opinion that the complaint is sufficient to entitle the plaintiff to recover. The form of the complaint need not be like declarations in ejectment, in suits under the revised statutes. (*Code*, §§ 69, 140. 2 *Kernan*, 165, 266.) The complaint in actions to recover the possession of real property must state facts instead of fictions, and its sufficiency must be tested by the code and not by the revised statutes. (*Code*, § 140.) The only provisions of the revised statutes made applicable to such actions, are those that relate "to the subject matter" of the actions, (*Code*, § 455,) and not those that relate to the form of the actions. I think Justice Harris erred in supposing the mode of pleading in such actions prescribed by the revised statutes is still in force, (12 *How. Pr. R.* 402,) and for the reasons before stated the decision in 2 *Duer*, 673, cannot be followed. I am therefore, in favor of reversing the judgment in this action and ordering a new trial; costs to abide the event.

GRAY and SHANKLAND, Justices, concurred in holding the complaint sufficient.

Judgment reversed.

[CHENANGO GENERAL TERM, October, 21, 1856. *Shankland*, *Gray*, *Mason* and *Balcom*, Justices.]

The People, *ex rel.* Horace H. Read, *vs.* The Overseers of the Poor of the Town of Triangle.

Where a warrant is issued by two justices of the peace, upon the application of the overseers of the poor, for the seizure of the property of an absconding husband and father, under the 8th section of the title of the revised statutes relative to the relief and support of indigent persons, and such property is seized thereon, and an inventory returned to the court of general sessions, that court has no authority to confirm such warrant and seizure without an inquiry into the facts and circumstances of the case.

It is not sufficient that the court is satisfied that a warrant has been issued by two justices, and that the overseers have seized the property and made an inventory thereof, and returned it to the court. An inquiry into the merits of the case was intended, by the legislature.

The court should require the overseers to produce some evidence to establish the case charged in the warrant, against the party whose property is seized, and the case may be contested by such party.

CERTIORARI to the Broome county sessions, to remove an order of that court confirming a warrant issued by two justices of the peace, on the application of the overseers of the poor of the town of Triangle, authorizing the said overseers to take and seize the goods, chattels and effects of the relator, and confirming a seizure made by the overseers, of the relator's property, under and by virtue of said warrant. The warrant was issued under the 8th section of the title of the revised statutes relative to the relief and support of indigent persons. (1 *R. S.* 613.)

G. W. Hotchkiss, for the overseers.

J. McDonald, for the relator.

By the Court, Mason, J. A just construction of the statute under which these proceedings were had, will not permit this order of the Broome sessions to stand. The 8th section of the act provides that when a father shall abscond from his children or his wife, leaving any of them chargeable, or likely to become chargeable, upon the public for their support, the overseers of the poor of the town where such wife or children may be, may

apply to any two justices of the peace of any county in which any estate, real or personal, of said father or husband may be situated, for a warrant to seize the same; and that upon due proof of the facts aforesaid, the said justices shall issue their warrant, authorizing the said overseers to take and seize the goods, chattels and effects, things in action and the lands and tenements of the person so absconding. (1 *R. S.* 615, § 8.) The 9th section authorizes the said overseers, by virtue of such warrant, to seize and take the said property wherever the same may be found, in the same county, and declares that they shall be vested with all the right and title to the said property which the person so absconding had at the time of his departure. And this section further declares that all sales and transfers of any personal property left in the county from which such person absconded, made by him after the issuing of such warrant, whether in payment of an antecedent debt, or for a new consideration, shall be absolutely void. This section also provides that the said overseers shall immediately make an inventory of the property so seized by them, and return the same, together with their proceedings, to the next court of general sessions of the peace of the county where such overseers reside, there to be filed. (1 *R. S.* 615, § 9.)

The 10th section, upon the construction of which the main question in this case depends, reads as follows: "The said court, upon inquiring into the facts and circumstances of the case, may confirm the said warrant and seizure, or may discharge the same; and if the same be confirmed, shall from time to time direct what part of the personal property shall be sold, and how much of the proceeds of such sale, and of the rents and profits of the real estate, if any, shall be applied towards the maintenance of the children or wife of the person so absconding." (1 *R. S.* 616, § 10.) In the case at bar, the counsel for the overseers of the poor produced before the court of sessions the warrant and inventory, and return of the overseers, and without producing further proof, moved for an order confirming the warrant and seizure. The counsel for Read moved that the proceedings be dismissed, on the ground that there was no

proof upon which said warrant could be confirmed. This motion was denied, and the court of sessions made an order thereupon, confirming the said warrant and seizure, and ordering a sale of the property, and that the avails be applied to the support of the wife and children. It seems to me that the duty is imposed upon the court of sessions, before confirming the warrant and seizure and directing a sale of the property, to make some further inquiry into the facts and circumstances than was done in this case. The only inquiry which the court of sessions made, was to ascertain the fact that a warrant had been issued by the two justices, and that the overseers had seized the property and made an inventory thereof, and returned the same to the court. The proof upon which the warrant is issued by the justices remains with them, and is not required to be returned to the court of sessions; and it is very clear, from the language of the 8th section, that the proof before the justices need not be in the form of affidavits. Oral proof is a compliance with the statute; and hence the evidence upon which the warrant issues is not preserved, even by the justices, and the only protection afforded to the citizen against an unjust seizure and sale of his property under this statute is that secured by the 10th section of the act. The court of sessions is the first forum where really any investigation into the case is secured to the party. It is true the warrant is not to be issued without proof; but that proof is made ex parte, and no record of what the proof is upon which the warrant issues being required, it affords little protection to the party to say that it must be issued on proof. If the legislature had intended that the court of sessions should confirm the warrant and the seizure of the property and order a sale, on the bare return of the warrant and inventory by the overseers with their return that they had seized the property, they would probably have said so. They have said, on the contrary, that upon inquiring into the facts and circumstances of the case, the court may affirm the warrant and seizure, or may discharge the same. It is only upon inquiry into the facts and circumstances of the case, that the court is authorized to confirm the warrant and seizure. The

facts and circumstances of the case mean something more than the warrant and inventory, I apprehend. An inquiry into the facts and circumstances of the case, ordinarily, means an inquiry into the merits of the case; and in such a sense, I have no doubt, the legislature intended to use these terms in the statute under consideration. The court should have required the overseers to produce some evidence to establish the case charged in the warrant, against the party proceeded against, and such case the relator had a right to contest. Had there been any evidence produced before the court of sessions upon which the judicial mind could act, we could not interfere upon this common law certiorari, on the ground that we deemed it insufficient to justify the confirmation of the warrant and seizure. I am of opinion, for the reasons above stated, that the order of the court of sessions confirming the warrant and seizure and ordering a sale of the property, should be reversed, and the court of sessions be directed to make inquiry into the facts and circumstances of the case, and to confirm the warrant or discharge the same, as they shall find the case to be. There is nothing in the other objections raised by the relator. The overseers of the poor are authorized to institute these proceedings, in all the counties. Their jurisdiction is concurrent with that of the superintendents in those counties where all the poor are a charge upon the county, and in those towns which are required to support their own poor, their jurisdiction is exclusive. The costs in this suit must abide the event of the determination of the court of sessions.

[CHENANGO GENERAL TERM, October 21, 1856. *Shankland*, *Gray* and *Mason*, Justices.]

23 240
59h 271
23 240
57 641
4L 265
8h 292
9h 45
20h 122
30h 244

SEAMAN *vs.* LUCE.

Where a judgment debtor has three horses, either two of which may constitute a team, and one of the horses is levied upon by a constable, by virtue of an execution, the debtor may at the time of the levy, or within a reasonable time after he has notice thereof, elect to claim such horse as exempt property. If he fails to make such election he cannot maintain replevin against the officer. BALCOM, J., dissented.

If a debtor has more than two horses, which are worth, in the aggregate, over $150, notwithstanding two of them are necessary for him as a team and are therefore exempt from execution, yet a constable has a legal right to levy upon and take away either one of the horses, on execution against the debtor, leaving property, including the other horses, worth more than $150; and cannot be made a trespasser for so doing, unless the debtor makes his election, at the time of the levy, to claim the horse levied upon, as exempt. BALCOM, J., dissented.

The debtor can only recover for the detention of the horse levied on, after giving notice to the officer that he claims such horse as exempt, and after demanding such horse, and giving the officer an opportunity to return the same.

Where, in an action for the recovery of personal property, the property is delivered to the plaintiff and he fails in the action, the defendant cannot now have a judgment for a return of the property, or a judgment for its value, at his election. But he must, under § 277 of the code, take a judgment in the alternative, for the return of the property, or for the value thereof as assessed, in case a return cannot be had.

Where a constable levies upon property by virtue of an execution, he has a special interest therein, as against the owner, to the amount due upon the execution, including his fees. And if the debtor brings replevin against the officer, and the latter has a verdict in his favor, the jury should assess the value of the property at that amount.

The rule was settled, previous to the code, that in an action between the general owner of property and one having only a lien upon it or a special interest in it, when the latter prevailed, his damages were limited to the amount of his lien or special interest, and this rule has not been changed by the code

THIS was an action of replevin. The plaintiff claimed to be the owner of the property and that the same was exempt from levy and sale on execution, under the act of 1842, exempting necessary household furniture and working tools and team. The defendant justified the taking of the property, as a constable, in virtue of two executions against the plaintiff, one in favor of Tracy Beadle and the other in favor of Joseph Harris. The jury under the charge of the judge, found that the property was not

exempt, and that the plaintiff had no cause of action against the defendant for levying on it. The judge then directed the jury to find the value of the property claimed and described in the complaint, and for which the court decided that the defendant was entitled to judgment in case a return of the property could not be had; to which decision and direction the plaintiff's counsel excepted, claiming that the defendant was not entitled to recover more, or to a judgment for a sum greater, than the amount due on the executions under and by virtue of which the property was taken. The jury, under such direction of the court, found the value of the property to be $65, which was much more than the amount of the executions. The evidence in the case showed that the plaintiff had three horses, and that the defendant levied upon one while the plaintiff had it harnessed with another horse belonging to him, before a two horse wagon. The levy was made in the village of Elmira, where the plaintiff had driven his team from an adjoining town in which he lived, the third horse of the plaintiff being at home in the pasture. The evidence also showed that there was other property left, which was apparently exempt, exceeding in value $150. Upon this branch of the case, the judge at the circuit charged the jury as follows, to wit: that by reason of the executions issued by the justices of the peace and by reason of he defendant being a constable and having said executions in his hands, he had a lawful right to take the bay horse, unless the said horse was exempt from levy and sale on execution under and by virtue of the provisions of § 1 of the act of the legislature entitled "an act to extend the exemption of household furniture and working tools from distress for rent and sale a execution," passed April 11th, 1842. To which opinion the counsel for the plaintiff duly excepted. And his honor, the circuit judge, further charged the jury that the evidence showed that the plaintiff had two other horses and a plow and harrow and a wagon, and some other property, which were apparently exempt under said act, or might be at the election of the plaintiff, and which with the horse claimed in this action, exceeded in value $150, and that the plaintiff had a right to elect

which horse or what portion of said property, not exceeding in value $150, he would claim or retain as exempt; that such election must be made at the time, or within a reasonable time after notice that a levy had been made upon any portion thereof, by a notice given to the officer making a levy; and that unless the plaintiff in this case did, as soon as he was informed of the levy and the taking of the horse by the defendant, and within a reasonable time thereafter, and before commencing this action, give notice to the officer, (the defendant,) that he claimed the said horse as exempt property, he could not recover in this action. To all of which, and particularly to that portion or part of said charge in which the judge instructed the jury that the plaintiff had two or three horses and a plow and harrow and a wagon and some other property which were apparently exempt under said act, or might be, at the election of the plaintiff, and to that part or portion of said charge in which his honor instructed the jury that the plaintiff could not recover in this action unless it was proved that at the time of, or after the levy and before the bringing of this action, he gave notice to the constable, (the defendant,) that he claimed said horse as a part of his team and as exempt, the plaintiff's counsel duly excepted. The judge further delivered his opinion to, and charged the jury, that as the plaintiff had three horses which were proved to be worth in all $210, and notwithstanding two of said horses were necessary for the plaintiff as a team, and therefore exempt, yet the defendant as constable had a legal right to levy upon and take away one of said horses on execution against the plaintiff, and could not be made a trespasser for so doing unless the plaintiff had made his election to claim the horse levied upon as exempt, at the time of such levy; and that the plaintiff could only recover for the detention of said horse after giving notice to the defendant that he claimed such horse as exempt, and after demanding said horse and giving the defendant an opportunity to return him; to which opinion and charge the plaintiff's counsel also excepted.

There was no evidence in the case showing that the plaintiff had made any claim of the defendant or given any notice to

him that he claimed the horse in question, before the institution of the present action. The jury, under the above charge, found that the horse was not exempt property, and that the title was in the plaintiff, and assessed the value thereof at $65. The judge at the circuit, without giving judgment, directed that the case be first heard at a general term.

Hart & Benn, for the plaintiff. I. The executions under which the defendant took the property in question, were invalid, and did not justify the taking.

II. The horse in question was exempted from execution, and the defendant was not justified in levying upon and taking the same from the plaintiff's possession, by the executions in question, conceding them valid. By the act of 1842, necessary household furniture and working tools and team, owned by any person being a householder, or having a family for which he provides, to the value of not exceeding $150, are exempt from execution. (1.) The plaintiff brought himself within the statute by showing he was a householder; that the horse in question was *part of his team*, and that *such team was necessary*. The exemption arises from these facts. This is a question of construction of the statute as applied to proofs, and not a question as to injurious results following its application, or as to the perplexities, which such application may bring to an officer. (2.) The fact that the plaintiff had other property, which was apparently exempt, or might be, at the election of the plaintiff, exceeding in value, with the horse in question, $150, did not make it necessary for the plaintiff to give notice to the officer that he elected to claim the horse in question as exempt; and the charge of the judge was erroneous. The property is exempt by force of the statute and of the proof bringing it within the law. No action by the plaintiff was needed, as no act of his could render the property exempt. If the facts constituting the exemption exist, it is the privilege of the plaintiff, to be claimed in and enforced by the courts, and the force of the statute is not to be weakened by the imposition upon the debtor of requirements not contained therein. The officer was or he

was not a trespasser, in the act of taking. If the taking was rightful, no act of the debtor, subsequent thereto, could change the nature of the act or prevent the officer from rightfully selling. The officer acts at his peril, in levying on property, and the *duty is on him*, to see that the property he takes is subject to his process. (*Hoyt* v. *Van Alstyne*, 15 *Barb.* 568, 273.) His process expressly required him not to take exempt property —not to take this horse, if he was part of the plaintiff's necessary team. The duty is upon the officer, in the case of the debtor having different articles apparently exempt, but all of which cannot be, to notify the debtor that he has the process, and ask him to make the election, *before he levies.* In this way the officer can be fully protected, and the statute have its complete operation. Because, if the debtor should then elect, or should refuse to elect when called upon, he would be afterwards estopped from claiming the property taken. The officer is the actor, having process giving him directions, and knowing what the law exempts, while the debtor may be ignorant of his rights or duties, and there is far more propriety in requiring that the officer shall request the debtor to elect before the levy, than that the debtor shall, of his own motion, make the election. The debtor can know nothing of what the officer is about to do, unless informed by him, until the levy has been made, and *then* the wrong has been done. The ruling of the judge goes to the extent that the debtor, without information of what the officer is about to do, and thus with no duty on him to speak or act, until the levy be made, must then, after the wrong has been done him, make his election. Election as to what? Why, as to what property he prefers should be levied upon, and yet required to be made *after* the levy. That it is the duty of the officer to ascertain for himself whether the property is exempt, is indicated by *Shields* v. *Craney*, (3 *Wend.* 274.) In that case a horse enrolled for military service, and exempt by statute, was seized, and it was held that the sheriff should have ascertained from the military officer having the enrollment whether it had been enrolled. In all the cases under our statute, the proof of the facts bringing the property within its provisions is

held sufficient to make the taking wrongful. (*Van Sickler* v. *Jacobs*, 14 *John.* 434. 25 *Wend.* 570. 15 *Barb.* 568, 573. *Wheeler* v. *Cropsey*, 5 *How. Pr. Rep.* 288.) The true rule to be applied in the case put by the judge, it is submitted, is this: that the debtor shall have notice by the officer, of the execution, and that he is about to levy, and that he is obliged to elect which of the apparently exempt property he will claim as exempt. And if the levy is made without such notice, and the property taken is in fact exempt, such levy is wrongful. (3.) The facts do not warrant the application of the rule laid down by the judge. The plaintiff was not shown to have been present at, or to have known of the levy. Such rule is based upon the supposed facts that the plaintiff owned other property apparently exempt, and that such property was visible to the officer; when there is nothing to make the third horse exempt, actually or apparently, and the wagons and harness are not exempt; and whether the farming implements were owned at the time of the levy, does not appear. And when the levy was made at Elmira, away from the plaintiff's residence and without the officer having any knowledge of other property, and when the horse in question was in a team and therefore apparently exempt. Besides, the property referred to is covered by the chattel mortgages, and the mortgagee, and not the plaintiff, owned the same; and the plaintiff has the right to the horse in question as exempt, without regard to such other property.

III. The judge erred in refusing to allow the plaintiff to show he had other property, not exempt, sufficient to satisfy the executions; and to show that the property levied upon, other than the horse, was sufficient to satisfy the same.

IV. The defendant had but a special property in the horse, and could only hold the same for the purpose of satisfying the executions. (8 *Wend.* 445.) Having elected at the trial, to waive a return of the property, he was entitled to recover as damages only the amount of the executions.

Brooks & Tomlinson, for the defendant. I. The executions and indorsements thereon were properly received in evidence. Such executions were valid process in the hands of the constable at the time of the levy, against the defendant therein named, and if they are not absolutely void upon their face, the officer will be protected in the execution of them.

II. The evidence offered by the plaintiff's counsel was entirely immaterial. The fact of the plaintiff having other property than that levied upon by the officer, not exempt from execution, does not prove that such officer had no right to levy upon the particular property in question, or that the same was exempt from levy and sale on execution, or affect the right of property acquired by the officer by virtue of his actual levy thereupon. Such is likewise the case with the evidence offered by the plaintiff's counsel, at fol. 53, 4. If the officer did levy upon property more than sufficient to satisfy the executions, the defendant therein was entitled to the balance of the money derived from the sale thereof, after satisfying such executions. And even if the levy in this case was wantonly excessive, which is not pretended by the plaintiff, the officer's right of property is in no way affected by the circumstance. (*Dezell v. Odell*, 3 *Hill*, 215.)

III. The charge of the court was proper, and no error was committed thereby. (1.) Sec. 1 of the act of 1842, under which it is claimed by the plaintiff that the horse levied upon was exempt from levy and sale on execution, unlike the exemption act of the revised statutes, does not specify the particular articles to be exempted, but provides that, "in addition to the articles now exempt by law, &c. there shall be exempted from levy and sale necessary household furniture, and working tools, and team, &c. to the value of not exceeding $150." The amount of such exemption, as well as the three classes of property from which it may be composed, is limited, and the amount may be made up of one of the kinds of property therein mentioned or some or all of such kinds as the debtor may elect. The fact, as the court charged, will not be disputed, that "the plaintiff had two other horses, and a plow, and harrow, and wagon, and some other property which was apparently exempt, or might be at the elec-

tion of the plaintiff, and which, with the horse claimed in this action, exceeded in value $150." Therefore it is claimed by the defendant that as this exemption is for the benefit of the debtor, and is at his election, and as the act permits such debtor to hold, exempt from levy and sale on execution, "necessary household furniture, working tools and team," and as the amount of such exemption may be made up of any one of such kinds of property, or of some, or all of them, the duty of determining whether such exemption shall be a team, and if the debtor has three horses as in this case, which two of the horses shall be such team, or whether such exemption shall be household furniture and working tools or otherwise, is by the first section of the act imposed upon the party claiming such exemption, and not upon the officer, and such election must be made as the court charged. The party claiming the benefit of the exemption acts must show affirmatively the facts which entitle him to the benefit of the exemption claimed. (14 *John.* 434. 19 *Wend,* 47. 14 *Barb.* 457.) (2.) When the law confers upon the debtor the power of electing what particular property he claims as exempt, and an opportunity is given him to make such election, and he stands silently by and permits the officer to make his levy upon one of the three kinds of property in his possession, only one of which is exempt, without availing himself of his right to elect, such party will not be permitted afterwards to question the right of property of the officer, acquired by such levy. He is estopped, and will be presumed to have acquiesced in the levy so made, as in this case, the plaintiff was not deprived of property absolutely exempt, but only lost his election as to which of the kinds of property he would claim to the sum of $150, and this by his own act. (3.) The verdict is proper in form, (*Code,* § 261,) and if not it could be amended. (7 *How. Pr. R.* 21, *and note to* § 264 *Code.*) The claim made by the plaintiff's counsel at fol. 78, is incorrect. The action is brought to determine whether the plaintiff is entitled to the possession of the property, or the defendant by virtue of his levy thereupon, and his special property acquired thereby, and §§ 261 and 277 of the code determine

what the verdict and judgment shall be for the defendant, when he is entitled to the possession of the property.

MASON, J. The judge at the circuit was right in directing judgment to be in the alternative. The code has changed the law upon this subject, and where, in an action for the recovery of personal property, the property is delivered to the plaintiff and he fails in the action, the defendant cannot now have a judgment for a return of the property, or a judgment for its value, at his election. But he must, under section 277 of the code, take a judgment in the alternative, for the return of the property, or for the value thereof as assessed, in case a return cannot be had. (*Dwight* v. *Enos & Jones, Seld. notes of cases decided in the Court of Appeals, March term*, 1854. *Fitzhugh* v. *Wiman, id.* 78) The judge erred, however, in directing the jury to assess the value of the property in this action in behalf of the defendant, who had only a special property in the horse, to the amount of his lien on his executions, at what they found the real value of the property to be.

The property being in the hands of the plaintiff, the general owner, and the defendant having only a special property therein as against the plaintiff, the true value to be assessed and recovered by the defendant is the value of the special property, which in this case would be the amount of the two executions and the defendant's fees. I admit that sections 261 and 279 taken together would seem to require the assessment of the value of the property, and the consequent judgment to be for the real actual value of the property. Such construction, however, would work very great injustice in cases like the present, and the court of appeals have decided, in the case of *Fitzhugh and others* v. *Wiman*, (*Selden's notes of cases, supra*, 78,) that the assessment of the value, and consequent judgment, in a case like the present, must be at the real value of the defendant's interest in the property, or at the value of his special property, whenever the assessment is made against the general owner in whose possession the property is. (*Selden's notes, April 18th*, 1854, *p.* 78.) The value of the defendant's special property,

in this case, is the amount of the two executions and his fees and the judge should have directed the verdict accordingly. There must be a new trial for this error.

There are other questions in the case, which have been discussed, and which will necessarily arise upon the retrial of the cause. These we may as well settle now. The most important question in the case arises upon the judge's charge in defining the duties of the officer and the rights of the defendant, in regard to designating and determining what, of the exempt property, shall be taken and what left for the defendant, when, as in the present case, a selection is to be made from property of the same class which may be exempt under the statute of 1842. The plaintiff claims and insists that in a case like the present the officer must, before he makes his levy, notify the debtor that he has the execution and is about to levy, and that he is required to elect which of the apparently exempt property he will claim as exempt, and that the officer must leave, to the amount of $150, such property as the debtor designates; and that if the officer levies without such notice to the debtor and opportunity to elect, and the property taken is of the class of exempt property, such levy is wrongful, and the officer becomes liable in this action. The defendant, on the contrary, claims and insists that the charge of the judge in this case prescribes the true rule on this subject. The doctrine contended for by the plaintiff would, it seems to me, be a very impracticable one. The officer in many cases would find himself utterly powerless in attempting to enforce his execution, under such a rule, and in many cases the debtor might annoy the officer with difficulties, which it would be very unjust that he should possess the power to do. The prescribing a rule which shall define the duties of the officer, and at the same time properly protect the rights of the debtor, in a case like the present, is not free from difficulty. I do not think a more judicious rule can be laid down than that embraced in the charge of the judge in the case at bar, and am therefore disposed to adopt it.

It will hardly do to hold that the officer is invested with the absolute authority to determine, before he makes the levy, which

of the three horses belonging to a defendant in an execution, shall be taken, and which two shall be exempt as a team for the defendant. He might leave the defendant one of the three horses which would not work in a team with another horse at all, and thereby literally deprive the defendant of the benefit of a team. If we allow the officer the absolute right of determining which two of the three horses shall be exempt, he may in very many ways use the authority so oppressively as to render this statute, which was intended to secure a team to a judgment debtor as exempt property, of very little value to the debtor. On the contrary, if we allow the defendant in the execution the unqualified right of selecting from the class of exempt property to the extent of holding the officer liable as a trespasser in case he does not, before he makes his levy, call upon the execution debtor and request him to elect from the class of exempt property which he will claim as exempt, such a requirement would render the execution of the process extremely onerous upon public officers, and in many cases would seriously prejudice the rights of judgment and execution creditors. If, on the other hand, we hold, as one member of the court thinks the law is, that the question whether the particular property levied upon is exempt or not, is one of fact, to be referred to the jury in every case, it leaves the law, and consequently the rights of the parties, very uncertain. The judgment and discretion of the jury, in each individual case, would become the law of such case. The officer could never know, until the verdict of the jury was received, whether he had rightfully executed his process in regard to this species of exempt property or not. I do not understand the case of *Willson* v. *Ellis*, (1 *Denio*, 462,) as going the length which my brother Balcom supposes. He regards that case as holding the unqualified doctrine that the question whether a given article of property is exempt from execution under this statute or not, is a question the determination of which belongs to the jury, in every conceivable case. This statute of 1842 only exempts "*necessary household furniture, working tools and team.*" Now all that the case of *Willson* v. *Ellis*, (1 *Denio*, 462,) decides is that the question

whether a given article was necessary for the person claiming the exemption is one of fact, and not of law, and when the jury, as in that case, had in a justice's court found that a clock owned by a householder was not exempt, it was held that the verdict could not be disturbed on certiorari. I discover nothing in that case which in any respect conflicts with the views which I have expressed with regard to the statute. The jury have the question ultimately left to them, I admit, so far certainly as to determine whether the property claimed to be exempt is necessary for the party claiming the exemption. But under a statute so extremely loose as the one under consideration, there is a seeming necessity for the courts interfering and laying down some rule of conduct for the government of this class of officers, in executing processes of this kind. Whether the officer must find the execution debtor and allow him to make his selection from the exempt property before he makes his levy, on the pain of subjecting himself to an action of trespass for levying upon exempt property, is purely a question of law. The rule settling these conflicting rights between the officer and the execution debtor must be prescribed and settled by the courts, and the only question in my mind in regard to the whole matter is, what is the most salutary and judicious rule which can be prescribed in the given case. Shall the execution debtor be allowed the unqualified right of selecting his $150 from the class of exempt property before a levy can legally be made, or shall the officer be permitted to make his levy, reserving $150 to the debtor, and be allowed to go on and sell the same, and regard the property left by him as the exempt property, unless the debtor notifies the officer, within a reasonable time after the levy, that he desires to hold as exempt some of the property levied upon, and designates the articles; or shall we allow the officer the unqualified right of selecting for the debtor his exempt property from the class of property exempt; or shall we allow the officer to select, and refer every case to the approval of a jury, whether he shall be justified in the selection which he has made, and consequently be protected in his levy; or shall we allow the officer to call in

a disinterested third person to select for the debtor $150 from the class of exempt property? There is no such thing on either side as an absolute question of right in regard to the selection from the class of exempt property under the statute. The debtor is entitled to possess just such rights as the courts may think it right and proper he should possess, and the case is precisely the same in regard to the officer. The rule, however, should be definite, fixed and certain, and as the legislature have left the matter all loose and open, the courts must prescribe the rule which shall govern the conduct of the officer in regard to the execution of such process against this class of exempt property. I am satisfied with the rule prescribed in the charge of the judge, and think we should adopt it as the rule.

SHANKLAND, J., concurred in the opinion of Justice Mason.

GRAY, J., was of the opinion that the horse levied upon was not exempt property, but came to the conclusion that a new trial should be granted, on the ground that the judge at the circuit erred in directing the jury to assess the property at its full value as against the plaintiff, instead of the amount of his executions. And upon this point all the members of the court concurred.

BALCOM, J. This is an action to recover the possession of a bay horse that the defendant, as constable, took from the plaintiff by virtue of two executions against him that were issued by justices of the peace. The horse was retaken from the defendant and delivered to the plaintiff by the sheriff, upon an affidavit and notice issued to him at the commencement of the action. The jury found a verdict for the defendant, and by the direction of the judge they assessed the value of the horse at $65. To which direction the plaintiff excepted, and he insisted that the value of the horse should be assessed at no greater sum than the amount due upon the executions, including the defendant's fees thereon as constable, which amount was less than $65. The plaintiff had three horses at the time the defendant levied upon

the one in question. The plaintiff claimed that he was entitled to recover the possession of the horse, upon the trial, on the ground that it was exempt from levy and sale upon execution against him.

The judge charged the jury to the effect that the plaintiff had "two other horses" and other articles of property which were apparently exempt from execution under the statute, or might be, at the election of the plaintiff, and which, with the bay horse claimed in this action, exceeded in value $150, and that if the plaintiff did not at the time the levy was made by the defendant upon the bay horse or within a reasonable time after he had notice of the levy, elect to claim the bay horse as exempt property, by giving the defendant notice of such election, he could not recover in this action. The judge also charged, that as the plaintiff had three horses which were proved to be worth $210, and notwithstanding two of them were necessary for the plaintiff as a team and therefore exempt from execution, yet the defendant as constable, had a legal right to levy upon and take away one of the three horses on execution against the plaintiff, and could not be made a trespasser for so doing, unless the plaintiff had made his election to claim the bay horse levied upon, as exempt, at the time of such levy; and that the plaintiff could only recover for the detention of the bay horse after giving notice to the defendant that he claimed such horse as exempt, and after demanding such horse and giving the defendant an opportunity to return the same. The different portions of the charge were separately excepted to by the plaintiff's counsel.

I am of the opinion that the charge was incorrect. The case does not show that the plaintiff was present when the defendant levied upon the horse, or that the plaintiff demanded it of the defendant as exempt property, prior to bringing the action The judge should have submitted the question to the jury, whether the bay horse levied upon by the defendant was a part of the plaintiff's "necessary team." It has been determined that the question whether a given article is exempt from execution is one of fact, and not of law. (*Willson* v. *Ellis*, 1 *Denio*, 462.) The plaintiff owned three horses. The two left him

were greys, and had been worked together as a team. The one taken by the defendant was a bay, and it had been used with one of the greys and was harnessed with one of the greys when it was levied upon. It was therefore peculiarly a question for the jury to determine which two of the three horses constituted the plaintiff's "necessary team" at the time the levy was made.

I am also of the opinion that an execution debtor who has several horses or oxen, either two of which may constitute a team, has the right to elect which two horses or oxen, not exceeding $150 in value, he will keep for his exempt team, and that an officer who levies upon either one of such horses or oxen without requesting the debtor to elect which he will keep for his exempt team, does so at the peril of having a jury say whether the horse or ox he levies upon is a part of the debtor's "necessary team." If the debtor be absent, the officer should call upon his agent, or some other person having charge of his business, to make the election. Perhaps, in the absence of the debtor, his wife may be the proper person to make the election, in some cases, as agent of her husband. (*See Church* v. *Landers*, 10 *Wend.* 79.)

It seems to me the most reasonable rule the court can adopt, applicable to cases where the execution debtor has more than one team, is to require the officer who makes the levy to call upon the debtor, or his agent, and request him to elect which team he desires to retain as exempt property, and in case the debtor or his agent refuses or neglects to make such election, to permit the officer to determine which of the teams is exempt from and which is liable to execution, and levy accordingly. Such a rule will protect the rights of creditors as well as debtors, and render the execution of process easy in such cases.

The judge also erred in his instructions to the jury as to their finding the value of the horse in question. The defendant, as constable, only had a special interest in the horse to the amount due upon the two executions on which he took it, including his fees as constable thereon. The plaintiff was the general owner of the horse. The value of the horse to the de-

fendant was his special interest in it. The judge should have instructed the jury, if they found for the defendant, to assess the value of the horse at the amount due upon the two executions on which the defendant took it, including the defendant's fees as constable thereon. Such should have been the instruction to the jury upon this question, as the horse had been delivered to the plaintiff. (*Code*, § 277.) The rule was settled, before the code, that in an action between the general owner of property and one having only a lien upon it or a special interest in it, when the latter prevailed, his damages were limited to the amount of his lien or special interest. (8 *Wend.* 445. 21 *id.* 300. 7 *Cowen*, 670. 2 *Caines' Cases*, 200. 4 *Denio*, 227.) This rule has not been changed by the code. A new trial should be granted; costs to abide the event of the action.

New trial granted

[CHENANGO GENERAL TERM, October 21, 1856. *Shankland*, *Gray*, *Mason* and *Balcom*, Justices.]

HAWLEY *vs.* MORTON.

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The condition of a bond given to the plaintiff by the defendant, was that the obligor should from time to time and at all times during the life of the obligee, well and sufficiently maintain and keep the obligee, *in the house of him, the obligor*, with meat, drink, clothes and all other things necessary and convenient. The plaintiff, after having left the defendant's house, and sought another home, brought an action upon the bond. *Held*, that the defendant was not bound to clothe or board the plaintiff, any where except in his own house; that upon the plaintiff's living with him depended her right to require the defendant to board and clothe her. And it not appearing that the plaintiff had sufficient cause for leaving the defendant's house and living elsewhere, it was *further held* the action would not lie.

THIS action was tried before a referee, who found there was due, from the defendant to the plaintiff, at the date of his report, the sum of $180. Judgment was entered on the report

in favor of the plaintiff for $315.56, damages and costs. From this judgment the defendant appealed to the general term.

The action was brought upon a bond in the words and figures following, viz: "Know all men by these presents, that we, Alexander Morton and Esther Morton, of Walton, Delaware county, are held and firmly bound to Charity Hawley, of Walton, of said county, in the sum of five hundred dollars, lawful money of the state of New York, to be paid to the said Charity Hawley, her executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves jointly and severally, and our executors, heirs, administrators and assigns, firmly by these presents. Sealed with our seals. Dated this 22d day of November, 1848.

The condition of this obligation is such, that whereas the above bounden Alexander Morton and Esther Morton, for and in consideration of the use of a certain farm lying and being in the said town of Walton, which farm the late Harvey Hawley occupied at his death, and of which farm the said Charity Hawley has a right to occupy as long as she lives, for which use they have agreed and undertaken to keep and maintain the said Charity Hawley, during her life: If, therefore, the said Alexander Morton and Esther Morton, their executors or administrators, do, and shall from time to time, and at all times hereafter, during the natural life of the said Charity Hawley, well and sufficiently maintain and keep, or cause to be well and sufficiently maintained and kept, the said Charity Hawley, in the house of him, the said Alexander Morton, with meat, drink, clothes and all other things necessary and convenient, then this obligation to be void, or otherwise to be and remain in full force and virtue." [Signed,]

ALEXANDER MORTON. [L. S.]
ESTHER MORTON. [L. S.]

Witness, N. W. WILLIAMS."

The defendant took exceptions to the conclusions of the referee, upon the facts as well as the law. He also excepted to the report of the referee on the ground that it did not find facts enough to enable the plaintiff to recover, and did not sustain

itself. All other facts sufficient for a correct understanding of the points in the case are contained in the opinion of the court.

William Gleason, Jr., for the plaintiff.

William Murray, Jr., for the defendant.

By the Court, BALCOM, J. The bond upon which this action is founded bears date the 22d day of November, 1848. The condition of the same is, that the defendant and his wife shall from time to time, and at all times during the natural life of the plaintiff, well and sufficiently maintain and keep her, or cause her to be well and sufficiently maintained and kept, "in the house of him," the defendant, "with meat, drink, clothes and all other things necessary and convenient." The action was tried before a referee, who found that the plaintiff was supported by the defendant, in his house as one of his family, with board and clothing, for about one and one-fourth years after the giving of the bond, when she left the defendant's house, and has not since returned there to remain with him, and since which time the defendant has contributed but little to the plaintiff's maintenance and support. The referee also finds that the plaintiff did not live very happily with her daughter, who was the defendant's wife; that they had some hard words, and that the best of feeling did not exist between them; that the plaintiff was an elderly woman and preferred to live with a younger daughter, where her residence has been more agreeable. That from the facts proved it required a good deal of forbearance on the part of the defendant, which had not been exercised towards the plaintiff; *but who was at fault in the family controversy he did not think it necessary to determine*, inasmuch as he found that the plaintiff was justified in seeking other sources to provide herself with raiment. The referee also thought the facts proved might justify him in reporting in favor of the plaintiff for her board; but he says that seemed never to have been required of the defendant, or asked, or demanded. He also states that so far as clothing is concerned he does not think that the

defendant fulfilled his contract; that in this respect the bond had been broken. Also that he was inclined to make a distinction between the clothes and board, holding the defendant responsible for the former, and not for the latter. The referee found as matter of law that the defendant was liable on the bond for four and seven-twelfths years clothing, with interest, after deducting some articles furnished by the defendant, amounting to the sum of $180; for which sum the plaintiff has entered judgment against the defendant, with costs.

It might be inferred from the tenor of the decision of the referee, that he was of the opinion the plaintiff was justified in leaving the defendant's house, by reason of improper conduct towards her on the part of the defendant or his family, if he had not expressly stated that he did not think it necessary to determine who was "at fault in the family controversy." This is the most important point in the case; for the defendant never expressly refused to furnish the plaintiff with clothing, if she would live at his house. The bond only obligated the defendant to sufficiently maintain and keep the plaintiff, *in his house*, "with meat, drink, clothes and all other things necessary and convenient."

Assuming, as we must, that the referee has not found that the defendant ever refused to board or clothe the plaintiff, provided she would live in his house, his finding of facts does not sustain his conclusions of law, unless the defendant was obliged to clothe the plaintiff wherever she chose to live, if she sent for, or called for her clothes at the defendant's house. I am of the opinion the defendant was under no such obligation. He agreed to furnish the plaintiff with board and clothing *in his own house* and not elsewhere. The plaintiff was to live with the defendant, and upon her living with him depended her right to require him to board and clothe her, and I can see no ground for the distinction taken by the referee between the board and clothing. (*See Pool* v. *Pool*, 1 *Hill*, 580; *McKillip* v. *McKillip*, 8 *Barb.* 552; 17 *id.* 410.)

If the plaintiff left the defendant's house without sufficient cause therefor, the defendant was under no obligation to furnish

her with either clothes or board. But if the conduct of the defendant or his family towards the plaintiff was such as to make it improper for her to remain in the defendant's house, it was a breach of the condition of the defendant's bond, and the plaintiff had the right to leave there and procure board and clothes elsewhere, and charge the defendant for the same. And under such circumstances no demand of board or clothing of the defendant was necessary. But as the referee has not found that the plaintiff had sufficient cause for leaving the defendant's house and living elsewhere, but expressly held it was not necessary to pass upon that question, the judgment in the action must be reversed and a new trial granted, costs to abide the event

Decision accordingly.

[Chenango General Term, October 21, 1856. *Shankland, Gray, Mason* and *Balcom*, Justices.]

Buck *vs.* Fox and Hugg.

On the 2d of February, 1839, the plaintiff had title in fee to certain lands. On that day P. recovered a judgment against him, for $244.29. On the 1st of July, 1839, F. recovered a judgment against the plaintiff and B. for $907.45. These judgments were liens on the lands. The sheriff, by virtue of executions issued to him thereon, advertised the lands for sale, and sold the same, on one or both of the executions, to P., on the 25th of November, 1839, for $305, the amount due on P.'s execution, which was returned satisfied. The execution in favor of F. was returned unsatisfied. The sheriff's certificate stated that he sold the lands by virtue *of both executions*. The plaintiff failed to redeem the lands within the time given him by law; but within the time allowed for judgment creditors to redeem, F., by virtue of his judgment, redeemed the lands, by paying to the sheriff the amount of P.'s bid. At the end of fifteen months from the sale the sheriff gave to F. a deed of the lands, which recited a sale of the lands *upon P.'s execution alone*, and the redemption by F. on his judgment. Under this deed F. went into possession of the lands. *Held* that if the sheriff sold the lands solely upon P.'s execution, F. obtained the legal title thereto. And that it was a question of fact for the referee to determine, whether the sheriff sold upon P.'s execution alone, or upon both.

Held further, that in the absence of any decision by the referee upon that ques-

tion, P. s equitable right to the lands was superior to the plaintiff's title to the same; and that, as F. must be deemed to have acquired the equitable rights of P., by the payment to the sheriff of the amount of P.'s bid, his equitable right to the lands must prevail over any title the plaintiff had to the same.

APPEAL from a judgment entered upon the report of a referee. The facts of the case sufficiently appear in the opinion of the court.

H. Van Derlyn and *E. P. Hart*, for the plaintiff.

Patterson & Gillet, for the defendants.

By the Court, BALCOM, J. This is an equitable action, in which the plaintiff claims a judgment, declaring the title to certain lands situated in Chemung county, to be in him; that he recover the possession thereof from the defendants; that a deed of the lands from the sheriff of Chemung county to the defendant Fox be corrected and declared void as against the plaintiff; that the defendant Fox account to the plaintiff for the rents and profits of the lands; and that such rents and profits be applied to the payment of a judgment hereinafter mentioned, which the defendant Fox recovered against the plaintiff and Geo. W. Buck, in July, 1839. There is a claim in the complaint for other or further relief.

On the 2d day of February, 1839, the plaintiff had title in fee to the lands in dispute. On that day Nehemiah Platt recovered a judgment in the supreme court, against the plaintiff, for $244.29. And on the 1st day of July, 1839, the defendant Fox recovered a judgment in the same court against the plaintiff and George Buck, for $907.45. These judgments were liens on the lands in dispute from the time of their recovery.

Albert A. Beckwith, as sheriff of Chemung county and by virtue of executions issued to him upon these judgments, advertised the lands for sale; and he duly sold the lands by virtue of the execution in favor of Platt, alone, or by virtue of both of the executions, on the 25th day of November, 1839, to Platt, for $305. That sum was the amount then due upon Platt's execu-

tion, which the sheriff returned satisfied. The sheriff returned the other execution in favor of Fox wholly unsatisfied. The sheriff's certificate of sale states that he sold the lands by virtue of *both of the executions.* The plaintiff did not redeem the lands within the time allowed by law for him to redeem them; but within the time allowed by law for judgment creditors to redeem, Fox, by virtue of his judgment redeemed the lands, by paying Platt's bid to the sheriff. After the expiration of fifteen months from the sale, the sheriff gave Fox a deed of the lands, which recites a sale of the lands by virtue of *the execution in favor of Platt alone*, and the redemption by Fox on his judgment against the plaintiff and George W. Buck. Fox went into possession of the lands, under the sheriff's deed to him, and has since held possession of the same. The defendant Hugg was in possession of the lands, or some part thereof, as tenant of Fox, at the time the action was commenced. The action was tried before a referee, who decided that the defendants were entitled to a judgment against the plaintiff that the complaint be dismissed. Such a judgment has been entered, from which the plaintiff has appealed.

If the sheriff sold the lands solely upon the execution in favor of Platt, the defendant Fox has the legal title thereto. Whether he did sell the lands by virtue of such execution alone, or by virtue of the executions issued upon the two judgments against the plaintiff, was a question of fact, as to which the referee in his decision states: "Whether the sheriff professed to sell under and by virtue of the execution in favor of Fox, as well as the execution in favor of Platt, does not appear." But the referee in his opinion that is annexed to the defendants' points, says, "my conclusion upon the whole evidence is, that the statement in the deed is more likely to be true than the statement in the certificate." Putting all the conclusions together found by the referee, it seems to me the evidence failed to convince him that the sale was made upon both of the executions, and that he therefore held the deed valid from the sheriff to Fox.

But granting that the referee did not pass upon this question

the evidence shows that Platt's equitable right to the lands is superior to any title the plaintiff has to the same; and had Platt and the sheriff been made defendants in the action as they should have been, (*see Code*, § 122,) the plaintiff could not have the lands, even if the referee had found that the sale was made by the sheriff upon both of the executions. And as Fox must be deemed to have acquired the equitable rights of Platt by the payment to him, or to the sheriff for him, of his bid, his equitable rights to the lands must prevail over any title the plaintiff has to the same.

If the sheriff and Platt had been made defendants, the former could be compelled to convey the lands to the latter and the latter to convey the same to Fox. (*Code*, §§ 150, 274. 2 *Kern.* 156, 336.) Such would have been the result of the case if the sheriff and Platt had been made defendants, provided it appeared that the lands were sold upon both of the executions; unless Platt elected to avoid the redemption by refunding to Fox the money that the latter paid for his bid; and in such case Platt would hold the lands, as against the plaintiff, and his title would be made perfect by a deed to him from the sheriff. Upon the facts proved the plaintiff was not entitled to recover. The judgment in favor of the defendant should therefore be affirmed, with costs.

Judgment accordingly.

[Chenango General Term, October 21, 1856. *Shankland, Gray, Mason* and *Balcom*, Justices.]

Bartlett *vs.* Judd.

A sheriff, at the time of selling the real estate of D. T. on execution, *excepted* and reserved 63 acres of land formerly owned by D. T., but then belonging to W. S. He executed a certificate of the sale, to B. the purchaser, in which he described the premises sold, as "being the whole of lot number four, &c. *excepting* and reserving therefrom the lands conveyed by D. T. to W. S." &c. He subsequently gave to B. a deed of the land purchased by him, describing it in the same manner. In fact D. T. never sold and conveyed any land to W. S. He

Bartlett *v.* Judd.

had, prior to the sheriff's sale, conveyed the 63 acres to M., and M. had conveyed the same to W. S., who owned the land at the time of the sale. In an action by B. against a grantee of W. S. to recover the possession of a portion of the 63 acres, on the ground that the 63 acres were not embraced in the exception, but were sold, with the rest of lot No. 4, and were bid off by B. and conveyed to him by the sheriff's deed, parol evidence was received which clearly showed that the 63 acres were reserved by the sheriff, at the time of the sale, and that it was intended and supposed, at the time, that the exception in the certificate and deed embraced the 63 acres. *Held* that this was a proper case for a reformation of the sheriff's deed; it appearing that the description of the premises, therein, was founded on a *mistake;* and the rights of creditors not being in question.

Held also, that, both parties claiming under the same title, were in privity, so as to authorize the interposition of a court of equity; and that the code (§ 150) authorized the defense to be set up, and the granting to the defendant of the affirmative relief to which he was entitled. (§ 274.)

Held further, that the statute requiring bills for relief, in all cases not otherwise provided for, to be filed within ten years, was not a bar to the relief sought by the defendant; that he, being the equitable owner, and in possession, of the premises, the statute, as a bar to his equitable right, would not begin to run, until actual *eviction* by the holder of the legal title.

The equitable owner, in possession of the premises, is, under such circumstances, justifiable in waiting until an attempt shall be made by virtue of the mistaken deed, to disturb his possession.

APPEAL from a judgment entered upon the decision and report of a referee. The action was brought to recover possession of about two and a half acres of land. It was commenced in March. 1854.

In January, 1835, the plaintiff recovered a judgment in the supreme court, against Daniel Tuttle, for $147.51. An execution was issued and returned unsatisfied. In February, 1834, Tuttle became the owner in fee of land described as lot four in Wellsville, Allegany county, containing 131$\frac{83}{100}$ acres. Tuttle, soon after, sold and conveyed a small portion of the lot to Sheldon Brewster; another small portion to John B. Church; and another portion to George B. Jones. On the 23d of July, 1834, Tuttle conveyed by deed, to one John Moon, about 63 acres of the lot, describing it by metes and bounds. The 2½ acres were included in the 63 acres. The deed to Moon was duly recorded July 25. On the 1st of August, 1837, Moon conveyed the 63

acres, by deed, to William Smith. This deed was duly acknowledged on that day, and recorded January 13, 1853. On the 22d of May, 1839, the plaintiff caused an alias *fi. fa.* to be issued on his judgment, to the sheriff of the county, by virtue of which the sheriff proceeded to advertise and sell real estate of the defendant Tuttle. The property was sold on the 13th day of August, 1839, to the plaintiff Bartlett. The sheriff, on the same day, made, executed and filed, in the office of the county clerk, a certificate of the sale, in which he described the premises sold, thus: "All that certain piece or parcel of land described as situate and lying in the town of Scio, county of Allegany and state of New York, being the whole of lot number four, township second, and range first, Morris reserve on the Willing and Francis tract, *excepting* and reserving therefrom the lands conveyed by David Tuttle to Sheldon Brewster, Norman Perry, John B. Church and William Smith, as by reference to the deeds will more fully appear. (There is supposed to be about forty-eight acres unsold to them.") On the 13th day of November, 1840, the sheriff executed to the plaintiff as purchaser, a deed of the land sold, describing it as it had been described in the certificate of sale. The deed was acknowledged and recorded on the same day. The defendant Judd was in possession of the premises claimed in this action, at the commencement thereof, and at the time of the trial, under a title derived, by mesne conveyances, from William Smith. Tuttle never sold and conveyed any land to William Smith. He conveyed the 63 acres to Moon, and Moon conveyed to Smith, and at the time of the sheriff's sale, Ephraim A. Smith, a brother of William, was in possession of the 63 acres as the agent of William.

The defendant, after denying the allegations in the complaint, answered new matter. He stated, substantially, that no sale was in fact made of the 63 acres, by the sheriff; that this land was expressly reserved, as land belonging to and owned by Wm. Smith. He alleged that such should have been the exception and reservation in the deed from the sheriff to the plaintiff, and he asked that the deed be reformed and corrected so as to reserve and except the said land, &c. &c. The plaintiff, in his reply,

denied the facts stated in the answer; and as to the claim that the deed be reformed, he set up the ten years' statute of limitations.

Upon the trial the referee heard parol evidence, under objection and exception by the plaintiff, touching the exceptions and reservations made by the sheriff at the time of the sale. It was clearly proved that the 63 acres—the land then owned by William Smith—was excepted by the sheriff at the sale, and the other small lots which Tuttle had conveyed to other persons. The referee decided, as conclusions of law, 1st. That the plaintiff's deed and certificate should be construed as if the words "by Daniel Tuttle" were left out, and read as follows, to wit, "excepting and reserving therefrom the lands conveyed to William Smith," and that the plaintiff acquired no title to the premises in dispute under the said deed, by reason of the same being excepted therein from the lands conveyed. 2d. That the deed was void by reason of being given before the expiration of fifteen months from the time of the sale. 3d. That the defendant was entitled to judgment in the usual form, with costs. The plaintiff excepted to these decisions; and judgment having been entered, he appealed to the general term.

A. P. Lansing, for the plaintiff.

M. Grover, for the defendant.

By the Court, MARVIN, J. The referee decided, as a conclusion of law, that the words in the sheriff's deed and certificate of sale, should be construed as if the words "by Daniel Tuttle" were left out. This would leave the exception to apply to the land conveyed to William Smith by Moon. I do not understand that this decision proceeded upon any principles relating to the reforming of the deed; but the referee gives to the deed a *construction* by which he rejects the words "by Daniel Tuttle." So understanding the decision, I am not prepared to concur. "If there are certain particulars, once

sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." (*Jackson* v. *Clark*, 7 *John.* 223.) It seems to me that the present case cannot be brought within this rule. All the description we have in this case is, "the land conveyed by Daniel Tuttle to William Smith." This will be the reading, rejecting what has reference to lands conveyed to other persons. There is no other description of the land intended to be conveyed. It is simply land conveyed *by Tuttle* to Smith. Strictly, the whole description is false, and mistaken; as in fact Tuttle never conveyed any land directly to Smith. He actually conveyed the land to Moon, and Moon conveyed it to Smith. And there can be no doubt, in the light of all the evidence now presented, that the 63 acres of land were not sold by the sheriff, and that it was intended and supposed, at the time, that the exception embraced it. But I do not think that we can reject any of the words used in the certificate or deed. We must have regard to certain other rules. "When the description of the estate intended to be conveyed includes several particulars, all of which are necessary, to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every description." Thus, if a man grant all his estate in his own occupation in the town of W., no estate can pass except what is in his own occupation and is also situate in the town of W. (*Jackson* v. *Clark, supra.*)

In *Roe* v. *Vernon*, (5 *East*, 51,) the previous English cases are stated, and the rule is laid down, that when there is a grant of a particular thing, once sufficiently ascertained by some circumstances belonging to it, the addition of an allegation mistaken or false, respecting it, will not frustrate the grant; but where a grant is in *general* terms, then the addition of a *particular* circumstance will operate by way of *restriction* and modification of such grant. Numerous cases are referred to by Lord Ellenborough in illustration of these rules; and our cases proceed upon the same distinctions. (*See Jackson* v. *Loomis* 18 *John.* 81; *S. C.* 19 *John.* 448.)

Lord Hardwick, in *Gascoin* v. *Barker*, (3 *Atk.* 9,) cited in 5 *East*, *supra*, says, "When a man does not make a certain definitive description, it is very difficult for courts of justice not to construe subsequent restrictive words as explanatory of the former." In the present case we have no description of the land, other than the land *conveyed by Daniel Tuttle*. The words, "by Daniel Tuttle" are *restrictive*, and, in my opinion, cannot be rejected, in giving construction to the instrument.

If the general decision of the referee was right, it will not be necessary to reverse the judgment. It is insisted, by the defendant's counsel, that in a legal sense the land was conveyed by Tuttle to Smith, through Moon, Tuttle's immediate grantor; that the covenants of Tuttle run with the land and enure to the benefit of Smith. I am not prepared to say that this position is not sound. The grant by Tuttle was to Moon, his heirs and *assigns*, and it may be that the language used in the exception should be construed as including the land conveyed by Tuttle to Moon and by Moon to Smith. But I will not pursue this suggestion.

The defendant made a clear case entitling him to a reformation of the deed from the sheriff to the plaintiff, unless the case is one to which the principles relating to the *reformation* of deeds and contracts do not apply; or unless the ten years' limitation statute, in equitable cases, interposes and bars him. The plaintiff was the purchaser at the sheriff's sale, and the certificate of sale was made to him, followed by the sheriff's deed. I can see no objection to the jurisdiction of a court of equity, at the suit of Smith or his grantees, to afford relief by reforming the deed of the sheriff to the plaintiff. The judgment was a lien upon the 63 acres, and the land could have been sold. It, and other small parcels, had however, been conveyed to purchasers prior to the sale, and the remaining lands of Tuttle, the judgment debtor, were sufficient to satisfy the judgment, and the land conveyed to Smith was not sold. No creditor of Tuttle redeemed. The rights of creditors are not, therefore, in question. *Dike* v. *Lewis*, (4 *Denio*, 237,) and *Tallman* v. *White*, (2 *Comst.* 66,) relate to sales of land made

by the comptroller, and have no application to the present case. *Mason* v. *White*, (11 *Barb.* 173,) is cited by the plaintiff's counsel. In that case a question arose as to the particular par cel of land which the sheriff sold and conveyed; there being two parcels answering more or less nearly to the description of the land in the sheriff's certificate of sale and in his deed. The land was purchased by the judgment creditor, and he trans ferred the certificate of sale to a third person, to whom the sheriff executed the deed. The sheriff was examined as a witness before the referee, with a view of ascertaining which parcel of land he sold, or intended to sell, and to which the description applied. Much evidence of this character was given. The court, in the 5th district, upon appeal, reversed the judgment. Justice Allen examined the case, and the questions raised, with his usual industry and ability, and laid down some rules touching sales and deeds by sheriffs, and made certain distinctions between them and deeds *inter partes*. He says that resort cannot be had to extrinsic evidence to establish the intent of the officer making the sale; that deeds of bargain and sale between man and man may, to some extent, be explained by showing the intent of the parties; and in some cases, if the deed, by fraud or mistake, fails to express the true intent, it may be reformed to express such intent. He adds: "It is very clear, however, that a deed of a sheriff cannot thus be reformed, and that if it follows the notice and certificate of sale, it cannot be in any respect varied for any reason, or made operative except according to its terms." This position was not necessary to the decision of the case. No question touching the reforming of the deed was involved in the case. Further on, the learned judge, after reviewing and remarking upon, cases *inter partes*, and showing how far and when evidence of the intent of the parties may be given, adds, "but such cannot be the principle applicable to a sale by a public officer, under judicial process, in which persons other than the officer and purchaser are interested;" and he refers to *Jackson* v. *De Lancy*, (13 *John.* 552.) In that case the sheriff sold, on execution, two parcels of land, described by metes and bounds, "and also all other the

lands, tenements and hereditaments whereof William, Earl of Stirling, was seised in the county of Ulster." It was held by the court that no title to any lands passed, except those described; that it was altogether inadmissible that the property of a defendant should be swept away on execution in so loose and undefined a manner. In *Jackson* v. *Rosevelt*, (13 *John.* 97,) it was held that a sheriff's deed describing the land as "all the lands and tenements of the defendant situate, lying and being in the Hardenburgh Patent," was void for uncertainty. Justice Allen does not refer to any case to sustain his position that a deed of a sheriff cannot be reformed. The cases *supra* have no application to such question, and it was not necessary to pass upon the question, in *Mason* v. *White*.

It is not necessary, in this case, to say whether the sheriff's certificate can be reformed, or whether his deed to a redeeming creditor, or in a case where a creditor or creditors, other than the purchaser at the sale, have, under the statute, acquired rights, can be reformed. But suppose A. has two farms, bound by the judgment, and the sheriff advertises both of them for sale by virtue of the execution, and on the day of sale sells to the judgment creditor one of the farms, for an amount sufficient to satisfy the execution, and by mistake includes both farms in the certificate to the purchaser, and at the end of fifteen months, no one redeeming, executes to the purchaser a deed of both farms, pursuant to the certificate. May not A. resort to a court of equity and have the mistake in the deed corrected? I certainly think he may. The present case is quite as strong as the case supposed. The evidence is clear and satisfactory that the sheriff did not sell the 63 acres. It was excluded at the sale, and there is no question but that all the bidders so understood. We have no difficulty in seeing how the mistake in the certificate and deed occurred. Smith, at that time, was the owner of the 63 acres, and his brother was in possession; and the sheriff, probably, without examining the chain of title, supposed that *Tuttle had conveyed to him*, and that he, the sheriff, had therefore included it by the exception in the deed. The defendant claims title, by mesne conveyances, from

Tuttle, and the plaintiff claims under the Tuttle title. The parties are therefore in privity, so as to authorize the interposition of a court of equity. (1 *Story's Eq.* § 145.) The code, § 150, authorizes the defense, and the granting to the defendant of the affirmative relief to which he was entitled, (§ 274.)

In my opinion the defendant made a case justifying and requiring a reformation of the deed, unless the ten years' statute of limitations in equity is a bar to such relief. The statute declares that "Bills for relief on the ground of fraud shall be filed within six years after the discovery by the aggrieved party of the facts constituting such fraud, and not after that time." (2 *R. S.* 201, § 51.) Is it quite clear that the present case may not be brought within this provision? There is no evidence of any *discovery* by the defendant or those through whom he claims, until the commencement of this action. The plaintiff was not present in person, at the sheriff's sale. His agent was, and knew that he did not purchase for the plaintiff the 63 acres. His knowledge was, in law, knowledge of the plaintiff; and is it not a fraud in the plaintiff, now, after the lapse of nearly fourteen years, to put forth this claim under the sheriff's deed? The land has been, in the meantime, conveyed several times to *bona fide* purchasers. We hear nothing of the plaintiff's claim until this action is commenced. The defendant is able to show that the plaintiff never purchased the land, and that the description, in the exception in the deed, is mistaken; and the plaintiff now says, although this may be so, a bill should have been filed within ten years, to correct the mistake and reform the deed. I am not prepared to say that in a court of equity, the defendant may not have relief on the ground of fraud. But as I have come to the conclusion that the ten years' limitation does not affect the defendant, I will not pursue, further, these suggestions.

By the statute, (2 *R. S.* 302, § 52,) in all other cases not provided for, "bills for relief shall be filed within ten years after the cause thereof shall accrue, and not after." When did the cause of action, for the relief which the defendant demands, accrue? In *Varick* v. *Edwards*, (11 *Paige*, 290,) it was held

by the chancellor that when the person to whom land belongs in equity, is in possession, and is afterwards evicted, by a person having the mere legal title to the premises, the statute of limitations, as a bar to the equitable right, does not begin to run until such eviction. And the person so evicted may file his bill in chancery, to establish his equitable right to the premises, at any time within ten years after such eviction.

In my opinion this principle applies to the present case. It is true the cases are different. Here, the plaintiff in fact had no legal title, though he had written, mistaken, evidence of such title. The defendant in fact had the title, but the sheriff had given a deed which might endanger his title, and perhaps the defendant, or those having the title, might upon ascertaining the danger, from the language used in the deed, have at once resorted to a court of equity for its reformation, for the purpose of removing a cloud from the title. But were they bound to know that the plaintiff would put the construction upon the deed which is now put upon it; or, if he should, that he would ever attempt so inequitably to enforce it against the owner of the land? Was not the owner justifiable in waiting until an attempt should be made, by virtue of the *mistaken* deed, to disturb his possession? I think he could safely do so, and that *Varick* v. *Edwards* is an authority for this position. There the possessor of the land had an equitable title, and his adversary had a legal title; and the chancellor held that the statute did not begin to run until there was an eviction. If it should be held that one in possession of land, under what he supposes a good title, must before he is disturbed, file his bill within ten years to be relieved from a state of things which may subvert his title, if an action is instituted within twenty years, the statute will become a snare. The person who has a technical legal title may remain quiet until the ten years have elapsed, and then enforce his legal title, resorting to the statute as a bar to any equitable rights which the defendant, and possessor, may have, and which equitable title would have been a perfect answer to the plaintiff's legal title, had it been asserted within the ten years. In my opinion, the equitable defense of the de

fendant was not barred by the statute. The referee should have decided that the deed be reformed.

It will not be necessary that we should express an opinion, whether the deed from the sheriff to the plaintiff is void because of its having been executed before the fifteen months had expired.

The judgment should be affirmed, unless the defendant desires that it be modified, so as to give the relief demanded in the answer, viz: that the deed be reformed; and if so, then the judgment should be so modified.

[Erie General Term, November 10, 1856. *Bowen*, *Greene* and *Marvin*, Justices.]

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23 272
20a 388
67a 533

The American Transportation Company *vs.* The City of Buffalo.

The act of July 21, 1853, amending the section of the revised statutes relating to the assessment and collection of taxes against moneyed or stock corporations, and to the method by which such corporations may be relieved from the payment of any tax, did not affect the charter of the city of Buffalo, or change the rule prescribed therein for the guidance of the board of assessors, in such cases.

Hence, if the board of assessors of that city is satisfied that a corporation has, during the previous year, been in the receipt of *any profit or income*, it is not obliged to strike the name of such corporation from the assessment roll, although its *net* annual profits, or clear income, have not been equal to *five per cent* on its capital stock.

CONTROVERSY submitted without action, pursuant to § 372 of the code. The plaintiff was incorporated and organized as a stock corporation on the 24th of January, 1855, pursuant to the act entitled "An act for the incorporation of companies to navigate the lakes and rivers," passed April 15, 1854. The capital paid in and secured to be paid was $900,000. Its office and place of business was in the first ward of Buffalo. The board of assessors of the city, on or before the

1st day of May, 1855, made and completed the annual assessment roll for each ward, inserting the name of the plaintiff and the amount of its capital. On the 12th of May, before the roll was revised or submitted to the common council, the plaintiff caused an affidavit to be made by its president and secretary, and to be presented to, and filed with, the board of assessors. The affidavit stated when the plaintiff was incorporated, its capital and place of business; that it had received in different sums, at different times since the 24th of January, 1855, the sum of $11,781 as and for the price of the carriage of goods, wares and merchandise, by the company. That the company had paid out and expended for the wages of men employed in the carrying business of the company, the sum of $21,850 for services performed; that the company had paid out and expended for other expenses of the company in and about its business, the further sum of $13,850, and also for the repair of its boats and propellers the sum of $32,800. That the company had never been in the receipt of any income or profits, except as stated. That the company owned no real estate; that none of the capital stock was owned by the state, or any state, or any incorporated library, or charitable institution. That the company had not been during the preceding year, or ever, in the receipt of net annual profits or clear income equal to five per cent on the capital stock of such company paid in or secured to be paid in, or in the receipt of any net annual profits or clear income to any per centage or amount.

The company, on the affidavits, requested and required the board of assessors to strike its name from the assessment roll, or to permit the company to be discharged from the payment of taxes and assessments during the year 1855, and to commute for the same without the payment of any sum. The board of assessors refused to comply with the request. Further proceedings were had, resulting in the collection of the tax, amounting to over $9000. The defendant received the money, and the plaintiff demanded judgment against the defendant for the amount so received by the city, with interest, &c.

Geo. B. Hibbard, for the plaintiff.

A. J. McNitt, for the defendant.

By the Court, MARVIN, J. "All lands and personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." (1 *R. S.* 387, § 1.) All moneyed or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital, in the manner hereinafter prescribed." (1 *R. S.* 414, § 81.) The assessors are required to enter all incorporated companies, liable to taxation in their respective towns, in the assessment roll, and to specify the amount of the capital of the company, paid in and secured to be paid in, &c. (*Id.* 415, § 5.) If the president or other officer of the company shall show, to the satisfaction of the board of supervisors, at their annual meeting, within two days from the commencement thereof, by the affidavit of such officer, to be filed with the clerk of the board, that such company is not in the receipt of any *profit or income*, the name of such company shall be stricken out of the assessment roll, and no tax shall be imposed upon it. (*Id.* 416, § 9.) The statute contains provisions relating to manufacturing, marine insurance, turnpike, bridge and canal companies, which it is not now necessary to notice. The legislature, April 13, 1853, passed an act to revise the charter of the city of Buffalo. The 5th title of the act (*Sess. Laws of* 1853, *p.* 472) relates to the assessment and collection of taxes, and the funds and expenditures of the city. The board of assessors of the city are to prepare an annual assessment roll of each ward, and to proceed, as near as may be, in the manner required by town assessors, except as in the act provided. Their assessment rolls are to be submitted to the common council, who have the same power to equalize them that the supervisors have to equalize the rolls of the county, &c. The assessors are to prepare two rolls as equalized, and certify and deliver one of them to the supervisors of the county, as and for the assessment roll for county purposes

By the 4th section, moneyed or stock corporations or banking associations in the city, liable to taxation upon their capital, are required, before the 15th day of January in each year, to present to the board of assessors the sworn statement required by certain provisions of the revised statutes. It is then added: "But if the board of assessors shall be satisfied, in the manner required by section 9 of said article, that any such corporation or association is not in the receipt of any *profits or income*, or if the said board shall be satisfied, in the manner required by section 13 of said article, that any turnpike, bridge or canal company, included in the roll, has not a net annual income exceeding five per cent on the capital stock paid in and secured to be paid in, it shall strike the name of such company from the roll." The distinction between "*profits and income*," and "*net annual income*," will be noticed.

On the 21st of July, 1853, the legislature passed an act (*Laws, ch.* 654) amending the revised statutes. The 9th section of the revised statutes, referred to in the charter as above stated, was so amended as to provide that if any incorporated company, named in the assessment roll, shall show to the satisfaction of the board of supervisors, at their annual meeting, within two days from the commencement thereof, by the affidavit of such officer, to be filed with the clerk of the board, that such company has not been, during the preceding year, in the receipt of *net annual profits, or clear income*, equal to five per cent on the capital stock of any such company, paid in or secured to be paid in, after deducting, &c. such company shall be entitled to commute for their taxes on such capital stock, by paying directly to the treasurer of the county, in which the business of such company is transacted, a sum equal to five per cent on such net annual profits or clear income."

It has been necessary to refer fully to these statutes, in order to present clearly the question presented in this case, and that question is, what effect has the act of July 21, 1853, produced upon the provision of the charter of the city, section 4, title 5, referring to section 9, above cited, of the revised statutes, as to

the manner of satisfying the board of supervisors, and the facts to be established.

If the provision in the charter referring to section 9 of the revised statutes has undergone a change, with the change of the section of the revised statutes occasioned by the act of July 21, 1853, then it is clear that the American Transportation Company was not liable to any taxation. It had not been, during the preceding year, in the receipt of *net* annual profits or clear income equal to five per cent, &c. It would have had the right to commute by paying five per cent upon "such net annual profits or clear income;" and as it had made no net annual profits or clear income, it would not have been obliged to pay any sum.

If, on the other hand, the provision of the revised statutes referred to in the charter, and the rule as prescribed in the charter remain in force as to the plaintiff, unaffected by the act of July 21, 1853, then the tax was properly assessed and collected, as the plaintiff had received profits or income. In my opinion the tax was properly assessed and collected.

The act of July has not affected the right of the city to impose and collect the tax. The plaintiff, as to the city, cannot avail itself of the provisions of the act of July. It was, by the revised statutes, liable to taxation. It derived an income or profit from its capital. It was not within any of the exceptions of the revised statutes. By the 9th section, if it was not in the receipt of *any profits* or income, no tax could be imposed, and the name of the company in such case was, upon certain proof, to the board of supervisors, to be stricken from the roll. By the charter, if the board of assessors should be satisfied, *in the manner provided in the section referred to in the revised statutes*, i. e. by the affidavit of the president or other proper officer, "that any such corporation or association is not in the receipt of any profits or income," &c. then the board "shall strike the name of such company from the roll." This is the language used in the charter. The reference to the revised statutes is simply to the manner of producing the evidence, and the kind of evidence to satisfy the board of assessors. The

facts, touching which the board of assessors is to be satisfied are, themselves, incorporated in the charter, and not affected in the least by the act of July, 1853. They are an integral portion of the charter, not dependent upon the language or provisions of the revised statutes. True, they are taken from the revised statutes, but an amendment of the statute, in this respect, from which this provision is taken, will not amend or alter this provision. It is not necessary, therefore, to inquire what would have been the effect, had the provision in the charter simply referred to and adopted the provision in the revised statutes, of a subsequent amendment of the provision of the revised statutes. I do not wish, however, to intimate any doubt upon such a question. I suppose, in such a case, we should read the charter as though the provisions of the statute referred to, and adopted, were incorporated in the charter; and that a subsequent repeal or amendment of the statute would have no effect upon the charter. But I will not discuss the question.

It is not necessary, in the present case, between the plaintiff and the city, to say what the rights of the plaintiff are, touching the county taxes. It may well be that, as to the county taxes, the plaintiff could avail itself of the provisions of the act of July, 1853. It is true that the city board of assessors is to certify and deliver to the supervisors as and for the ward assessment roll for county purposes, a copy of the roll as equalized by the common council. The board, however, act under the general law, and as amended by the act of July, 1853, by which the president, &c. of any incorporated company named in the assessment roll, may make the affidavit as to *net* annual profits or clear income, &c. and the statute declares the consequences which shall follow. It is not necessary to pursue the subject. The defendant must have judgment.

[Erie General Term, November 10, 1856. *Bowen*, *Greene* and *Marvin*, Justices.]

23 278
15a 528

GRIFFIN *vs.* CHASE and DAMON.

A redemption of property, by a judgment creditor, from a sale upon execution, cannot be made by calling at the office of the county clerk, the same being the office of the sheriff, and paying to the clerk, for the sheriff, neither the sheriff nor any of his deputies being present, the amount of the purchaser's bid, with interest, and presenting the papers showing the creditor's interest.

Such redemption can only be made by payment to the purchaser or his personal representatives or assignees; or to one who has redeemed; or to the officer who made the sale; or, in case of his absence from the sheriff's office, to the sheriff, under-sheriff, or any deputy present at such office. Payment cannot be made to the county clerk, nor to any other person, as the agent of the sheriff; unless he has been authorized to act, in the matter of redeeming, by an appointment as under-sheriff or deputy.

Where a redemption has been attempted, by payment to a person not authorized to receive it, the sheriff's certificate of the redemption, given to the redeeming creditor, being wholly unauthorized, is not evidence of the facts stated therein.

Nor is a certificate, given by the county clerk, to whom the necessary papers have been presented and the money paid, any evidence. He not being authorized to act in the redemption, has no authority to make a certificate.

A recital, in a deed given by the sheriff to a redeeming creditor, which states that C., as assignee of a judgment, &c. presented, *at the sheriff's office*, the papers required by law to be presented for the purpose of acquiring the right of the purchaser of the premises, and that having paid the amount required by law to be paid, for such purchase, he acquired the same, without stating *to whom* the papers were presented, or to whom the money was paid, will not *estop* the grantee in such deed from denying the regularity and validity of the redemption by C.; although such grantee claims title as a redeeming creditor from C.

Nor will the fact that the grantee in the sheriff's deed has, as purchaser at the sheriff's sale, accepted the money paid by C. on his attempted redemption, estop him from questioning the regularity of C.'s redemption.

THIS was an action to recover the possession of real estate situated in Allegany county. The defendant David Chase had been the owner, and was in possession of the premises. The plaintiff claimed title under a sheriff's deed. On the 29th of June, 1848, Leonard Kirby and Valentine Kirby recovered a judgment in the supreme court against David Chase and one Charles Gilman, for $729.83, which was docketed in Allegany county. An execution was issued thereon, and the sheriff sold the premises, on the 1st of March, 1849, to the plaintiff, and gave him the proper certificate of sale. The plaintiff gave in

evidence the deed from the sheriff to him. This deed contained the usual recitals. It also recited that on the last day of the fifteen months, Sally Chase, as assignee of a judgment against David Chase and Charles Gilman, in favor of William H. Bradford, presented at his [the sheriff's] office, the necessary papers required by law to be presented, for the purpose of acquiring the right of the purchaser of the premises; and that having paid the amount required by law to be paid for the purchase, she acquired the same. It was also recited that Griffin, the plaintiff, as assignee of a judgment in favor of Isaac F. Kirby, against Chase, presented at the sheriff's office the necessary papers required by law to be presented, for the purpose of acquiring the rights of Sally Chase and of the original purchaser, in the premises; and that he having paid the amount required by law to be paid for that purpose, for the benefit of Sally Chase, pursuant to the statute in such case made and provided, and no other person having appeared, to redeem the premises, and twenty-four hours after the last redemption having expired, he, the sheriff, granted the premises to the plaintiff. The defendant objected to the admission of this deed in evidence, on the ground that it did not appear that the plaintiff presented to the sheriff, upon the redemption made by him, any certified copy of the docket of the judgment upon and by virtue of which the redemption was made, or any proof of the assignment of the judgment, or any proof of the amount due on said judgment. These objections were overruled, and the defendant excepted. The plaintiff then offered in evidence a certified copy of the transcript of a judgment in the supreme court, against David Chase and Charles Gilman, in favor of William H. Bradford, docketed July 1, 1848; an assignment of the judgment to Sally Chase; and an affidavit of an agent of Sally Chase. Also a certified copy of the transcript of a judgment in the supreme court, against David Chase and Gilman, in favor of Isaac F. Kirby, docketed July 8, 1848; an assignment of the judgment to the plaintiff; and the affidavit of the plaintiff, &c. Also a certificate of the clerk of Allegany county, and a certificate of the sheriff, which are sufficiently noticed in the opinion. The de-

fendant objected to the papers relating to the redemption of Sally Chase, upon the ground that they were wholly immaterial and that there was no proof that they were the papers upon which the redemption was made. Also to the redemption papers of the plaintiff, on the ground that the redemption was not made to the sheriff or to any officer or person authorized to receive the redemption papers or money; that the amount paid by Griffin was not sufficient. The objections were overruled, and the defendant excepted. The papers were given in evidence. The plaintiff rested, and the defendant moved for a nonsuit, upon various grounds, which are sufficiently noticed in the opinion. The defendant gave no evidence, and the referee decided that the plaintiff was entitled to judgment for the premises demanded; and judgment being perfected, the defendant appealed to the general term.

A. P. Lansing, for the plaintiff.

W. Angel, for the defendant.

By the Court, MARVIN, J. It appears from the certificate of the clerk of Allegany county, dated and acknowledged July 5, 1850, that on the first day of July, 1850, the last day of the fifteen months from the time of sale by the sheriff, Sally Chase, by her agent, appeared at the clerk's office of the county, the same being the office of the sheriff of the county, and presented papers for the purpose of redeeming the premises sold by the sheriff to the plaintiff. He specifies the papers. He certifies that the sum of $511.13 was paid to him, the clerk, for the sheriff, neither the sheriff nor any of his deputies being at the time present, for the benefit of Griffin the original purchaser, and on behalf of Sally Chase, for the purpose of acquiring the rights of Griffin, &c. That this proceeding was not complete until 12 o'clock of that night. That immediately after 12 o'clock of the night of the 2d of June, (the second being Sunday,) and within twenty-four hours after the redemption by Sally Chase, Griffin appeared at his office, being the

office of the sheriff, and presented to him, the clerk, for the sheriff, neither he nor any of his deputies being present, papers (described) being the transcript of the docket of the judgment &c. in favor of Kirby, and accepted the $511.13 as such original purchaser, and paid to the clerk for the sheriff, $648.10 for the benefit of Sally Chase, and for the purpose of acquiring her right and the right of the original purchaser, and of redeeming &c. from Sally Chase. He certifies that no other person redeemed after the redemption by Griffin, within twenty-four hours, and that Griffin was therefore entitled to all the rights of Sally Chase and the original purchaser, &c. The certificate of the sheriff is substantially like the certificate of the clerk. In describing what was done, he used language slightly different, saying that "the sum of $511.13 was paid to the said clerk, *as my agent*, neither myself nor any of my deputies being present," &c. The deed executed by the sheriff to Griffin, the plaintiff, contains recitals of the redemption of Mrs. Chase and then of Griffin, which will be noticed hereafter.

It will be proper here, to say that Mrs. Chase, as relator, instituted proceedings for a mandamus to compel the sheriff to convey the premises to her, subsequent to the conveyance to the plaintiff, and that upon the return to the alternative mandamus, the court, at special term, denied the mandamus upon the ground that Mrs. Chase's redemption *to the clerk*, was unauthorized and invalid, and that Griffin's redemption to the clerk was also unauthorized and invalid for the same reason; and also for the reason that he did not pay an amount sufficient, he having neglected to pay interest from the time Mrs. Chase redeemed to the time he redeemed. The judgment was affirmed at the general term.

It will be proper to consider these questions now, for if the deed to the plaintiff was entirely unauthorized in consequence of Mrs. Chase's redemption being valid, and Griffin's not valid, the plaintiff could not recover, his title depending upon the sheriff's deed.

The office of the county clerk was the office of the sheriff, and the agent of Mrs. Chase supposed that the redemption

could be made to the clerk, in the absence of the sheriff and his deputies. In this he was mistaken. By the revised statutes, the redemption was to be made by the payment to the purchaser, his personal representatives or assignees, or to one who had redeemed, or to the officer who made such sale. The act of 1847, (*Laws, ch.* 410,) contains new provisions. Redemptions made on or after the last day of the fifteen months are required to be made at the office of the sheriff, and it is made the duty of the officer making the sale to attend at the office during the last day for making such redemptions, and during the time thereafter when such redemptions may be made, and in case of the absence of the officer who made the sale, from the sheriff's office at such time, then such redemption may be made to the sheriff; and in his absence, to the under-sheriff, or any deputy present at such office. (§ 3.) Here is no authority to the county clerk to act in the matter, though the sheriff's office and his office are the same, and though the sheriff, his deputies and under-sheriff are all absent from the sheriff's office. By the fourth section, any creditor having a right to redeem, may redeem within twenty-four hours after any preceding redemption. By section 5, it is made the duty of the officer making the sale, or any person who may lawfully act in his behalf, when a redemption shall have been made, to execute to the person making such redemption, his certificate, truly stating all such facts transpiring before him, at the making of such redemption, as shall be sufficient to show the facts of such redemption. This certificate can only be made by the person to whom the redemption is made, and such person must be the officer making the sale or a person who may lawfully act in his behalf. And section 3 tells us who those persons are, viz: the sheriff, and in his absence the under-sheriff or any deputy present at the sheriff's office. It is clear that Mrs. Chase's redemption was not valid, nor was Griffin's, they being made to the clerk, who was not the under-sheriff or a deputy of the sheriff. It is said that the clerk was the agent of the sheriff, and that this is shown by the certificate of the sheriff, where he says that the $511.13 was paid to the said clerk as his agent,

neither he nor any of his deputies being present. I do not understand from this that the sheriff ever appointed the clerk as his agent, to act for him in cases of redemption, even if it were possible for him lawfully to do so. The remark is that the money was paid to the clerk *as* his agent. But there are other answers to this point. The sheriff cannot confer the authority upon any one to act in the matter of redeeming, unless by appointing such person under-sheriff or deputy; and then such person has his authority to act from the statute. *Hall* v. *Fisher*, (9 *Barb.* 17,) is not applicable to this case. In that case the debtor, within twelve months, applied to the sheriff to redeem, and the sheriff, not having the certificate, told him to go to the clerk and have him ascertain the amount, and then hand the money to the clerk. It was held that the sheriff could make the clerk his agent to compute the amount and receive the money. When the debtor redeems, nothing is to be done but to pay the money to the sheriff, and the sale is then void No other creditor can redeem, and the sheriff, in such a case, may direct the debtor where to pay the money. When the twelve months expire, the rights of other creditors attach, and the law has cast upon the sheriff other duties. There is another answer; the certificate, made by the sheriff, was wholly unauthorized, and is not therefore evidence of any appointment of the clerk as his agent. The sheriff had nothing to do with the redemption, and had no authority to make any certificate. It is only "such certificates" as are made by persons mentioned in the act, that afford *prima facie* evidence of the facts therein stated. (§ 6 *of the act of* 1837.) It may also be remarked here, that the certificate of the county clerk is not evidence, as he was not authorized to act in the redemption and was not, therefore, authorized to make the certificate. We have then, no evidence, in the case, of any redemption by Mrs. Chase, unless the deed of the sheriff to the plaintiff furnished such evidence. If the certificates of the clerk and sheriff are taken as evidence of what actually occurred, then, as we have seen, no lawful redemption was made. But in truth they are not evidence for any purpose.

The defendant's counsel claims that the regularity of the redemption by Mrs. Chase is recited in the sheriff's deed to the plaintiff, and that he therefore is estopped from denying it; also that the plaintiff claims title as a redeeming creditor from Mrs. Chase, and that he is estopped from denying the validity of her redemption; also that the plaintiff having accepted the money under the redemption made by Mrs. Chase, he cannot now question the regularity of her redemption

I do not think these questions are necessarily presented by the deed. The sheriff says in the deed that "Sally Chase, as assignee of a judgment &c., presented at my office the necessary papers required by law to be presented for the purpose of acquiring the right of the purchaser of the premises, and having paid the amount required by law to be paid for said purchase, acquired the same." Substantially the same language is used in relation to Griffin's redemption. The sheriff does not say that Mrs. Chase redeemed to him or to his under-sheriff or one of his deputies. She presented at *his office* the necessary papers &c. and paid the amount required by law to be paid. The sheriff does not in the deed say to whom the papers were presented, nor to whom the money was paid. If the deed shows a good redemption by Mrs. Chase, it shows also a like good redemption from her, by the plaintiff, and he has the deed. In my opinion the doctrine of estoppel does not apply to the case. There is, however, no occasion for going into this question. Take the whole deed, with or without the recitals touching the redemptions, and the title is in the plaintiff.

The judgment must be affirmed.

[Erie General Term, November 10, 1856. *Bowen, Mullett, Greene* and *Marvin*, Justices.]

HYATT and others *vs.* PUGSLEY and others.

23 285
33 373
51 446

T. Pugsley, being seised in fee of a tract of land called the Cow Neck farm, died intestate, and the land descended to his sons, Isaac L. and Oakley, who were his only heirs at law. Isaac L. died intestate and without descendants, in the lifetime of his brother, and his half of the farm descended to Oakley Pugsley, who thereupon became and continued to be until the time of his death, seised in fee of the whole of it. He made a will, containing the following provisions: "*First.* After all my lawful debts are paid and discharged, I give and bequeath unto William Pugsley, Samuel Pugsley, Benjamin Pugsley and James Pugsley, sons of Samuel Pugsley of North Salem, all my household furniture, farming utensils, and what stock I have on the farm where I now reside. I also give and bequeath unto William, son of James Pugsley of Ossining, my large silver tankard, &c. I do give and devise unto Samuel Pugsley, William Pugsley and James Pugsley, near Cayuga lake in this state, the farm where I now reside, &c. containing about 160 acres, and the Cow Neck farm. I dc also give and devise unto the said last named Samuel, William, Benjamin and James" three houses in the city of New York. After specifying several intermediate devises and bequests, the will contained this clause: "I do also give unto William Pugsley, Samuel Pugsley, Benjamin Pugsley and James Pugsley, sons of Samuel Pugsley of North Salem, Westchester county, the personal property aforesaid, and no more." The testator died in 1853, leaving no living ancestor, nor any descendant, brother or sister, or any descendant of a brother or sister. His heirs at law were the descendants of the brothers and sister of his father, and of the brothers and sisters of his mother. The nearest heirs, on each side, were his first cousins.

Held, 1. That parol evidence was inadmissible for the purpose of showing that the testator intended to, and did, in effect, devise a portion of the Cow Neck farm to Benjamin Pugsley, (1) because it was designed to explain a patent ambiguity, and (2) because it would, if it could have any effect, create a new devisé. That if Benjamin Pugsley took any interest in the premises, under the will, it was by implication; and that was a question of law, which could not be elucidated by any extrinsic evidence as to the intention of the testator.

2. That the language used by the testator simply raised a conjecture that he might have supposed that he had included Benjamin Pugsley's name as one of the devisees, but that it was too remote either to alter the estate expressly given to others, or to confer any upon him. And that Benjamin Pugsley took no part of the Cow Neck farm under the will.

3. That James Pugsley, the only surviving devisee named in the will, took thereby only the one-third part of the Cow Neck farm.

4 That the remaining two-third parts of the premises descended to the heirs at law of the testator; and that one of those third parts descended to the descendants of the brother and sister of his father. That as to such third, the inheritance came to the testator on the part of his father; but as to the remaining third part, being the half of what was not effectually devised, that did not come to him on the part of his father, but it came to him from his brother.

5 That under the rule that collateral descent from brother to brother is immediate, taking no notice of the father, the one-third part of the farm, being the half of what did not pass under the will, descended to both the paternal and maternal collateral relatives of the testator.

6. That had all the first cousins of the testator survived him they would have inherited equal parts of what descended to them respectively. But that, as several of them had previously died, the cousins must be assumed as the stock, and the inheritance be divided into as many equal shares as there were first cousins living, or who had died leaving descendants.

When an ambiguity, in a will, is apparent from the face of the instrument, the general rule is that it is not susceptible of explanation by extrinsic parol evidence. The will must, in such cases, be its own expounder.

An obscurity purely instrumental cannot be explained by parol evidence. If that is so great that it cannot be discerned with reasonable probability who, or what, is meant by the testator, the provision is deemed insensible, and the proposed gift must fail altogether.

External evidence is necessary, and always admissible, to identify the person or thing sufficiently described to make the devise or bequest effectual. If that points to but one object, or to but one individual, clearly designated in the will, that controls. No evidence can then be received that any other person or thing was intended. But if the extrinsic evidence for identification produces uncertainty as to either, that may be removed or explained by other testimony.

The difficulty may be removed by the same instrumentality by which it is produced. The admissible evidence, in such cases, is always explanatory of person or thing actually expressed in the will. No parol evidence can be received to prove an additional or different subject matter, or some other donee.

Mode of stating the estates and interests of the several owners, in a judgment in partition.

THIS case came before the court on exceptions to the report of the referee in an action for partition. The material facts appear in the opinion of the court.

F. Larkin, for the plaintiffs. I. In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when they are apparent on the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But, then, the mistake must be apparent on the face of the will; otherwise there can be no relief: for, at least since the statute of frauds which requires wills to be in writing, (whatever may have been the case before the statute,) parol evidence, or evi-

dence dehors the will, is inadmissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity. (*Story's Eq. Jurisp.* § 179, *and authorities cited.*) But a mistake, in order to lead to relief, must be a clear mistake, or a clear omission demonstrable from the structure and scope of the will. Thus, if in a will, there is a mistake in the computation of a legacy, it will be rectified in equity. *So if there is a mistake in the name or description or number of the legatees intended to take*, or in the property intended to be bequeathed, equity will correct it. (*Id.* § 180. *Stebbing* v. *Walkley*, 2 *Bro. Ch.* 85. *Rivers' case*, 1 *Atk.* 410. *Parsons* v. *Parsons*, 1 *Ves. jun.* 266. *Beemont* v. *Fell*, 2 *P. Wms.* 141. *Hampshire* v. *Peirce*, 2 *Ves.* 216. *Braduni* v. *Harper*, *Ambler*, 374. *Tomkins* v. *Tomkins*, 3 *Atk.* 257.)

II. The court may supply omitted words in a will, to carry into execution the intent of the testator. (1 *Kinne's Law Compend.* 317. *Selden* v. *King*, 2 *Call's Virg. R.* 61. *Lynch and wife* v. *Hill and wife*, 6 *Munf.* 114. *Smith* v. *Bell*, 6 *Pet. R.* 68.) In *Garth* v. *Merrick* there was a bequest of a residue to the testator's six grandchildren by name; but the name of one of them was repeated and that of another omitted; yet all took equal shares. (1 *Brown's Ch. R.* 31.)

III. As William Pugsley, one of the sons of Samuel Pugsley, died in 1838, long before the will was made, it is not a lapsed legacy. A devise is said to be lapsed where the devisee dies in the intermediate period between the making of the will and the death of the testator. (13 *East*, 526.) The referee was right in holding that William Pugsley having died long before the will was made, the will is to be read the same as if his name had never been written in the will.

Smith Barker and *William N. Dyckman*, for the defendants. The questions to be discussed relate to the construction to be given to the third clause in the will of Oakley Pugsley, which is as follows: "I do give and devise unto Samuel Pugsley, William Pugsley and James Pugsley, near Cayuga lake in this state, the farm where I now reside in the town of Westchester

aforesaid, containing about 160 acres, called the Cow Neck farm." It is alleged in the complaint that the testator *intended* that the name of *Benjamin Pugsley* should have been inserted in this clause as one of the devisees. It is also stated that Samuel Pugsley and William Pugsley died before the testator: William before the making of the will, Samuel after; and it is alleged that the farm mentioned in the devise came to the testator *from and on the part of his father*. It is also alleged that the heirs at law of the testator are the children and descendants of the brothers and sisters of the testator's father; but the persons named in the complaint as the heirs at law of the testator, include the children and descendants of the brothers and sisters of the testator's *mother* as well as those of his *father*. On the part of the plaintiff it is contended, that Benjamin Pugsley (although not named in the devise) took an equal share with James Pugsley of the farm; that if any part of the farm descended to the heirs at law of the testator, it descended to the heirs at law on the part of the *father*, to the exclusion of those on the part of the *mother*, as the farm came to the testator from or on the part of the father. On the part of the defendants, on whose behalf these points are submitted, it is contended: That Benjamin Pugsley acquired no estate or interest under the devise in question, not being named therein; that parol evidence cannot be admitted to alter or vary the devise; that it can only be admitted to explain an *ambiguity* as to the *property devised*, or the *person* of the devisee. That James Pugsley is the only person who took any estate or interest in the farm, under the devise in question; that he took one-third thereof and no more—and that the devise of the other two-thirds which Samuel and William would have taken had they been living, lapsed by their death before the testator, and that those two-thirds descended to his heirs at law. That the testator acquired one half of the farm by descent from his brother Isaac L. Pugsley; and that the heirs at law of the testator on the part of the mother and those on the part of the father are together entitled to the one-half of that part of the farm which by the lapse of part of the devise in question descended to the testator's heirs at law

It is contended that the stocks from which the distribution is to be made are the uncles and aunts and not the cousins of Oakley Pugsley. In all cases where the inheritance descends to the brothers and sisters of the father and mother of the intestate, it is provided that it "shall descend in the same manner as if all such brothers and sisters had been brothers and sisters of the intestate.' (1 *R. S.* 752, §§ 10 *to* 13.) Section 8 provides that where some of the brothers and sisters of the intestate are living and some dead, the descent shall be *per stirpes;* the descendants of the deceased brothers and sisters taking, by representation, the share the parent if living would have taken; but no provision is made for the case where all the brothers and sisters of the intestate are dead, which is the present case; for by sections 10 to 13 the brothers and sisters of the intestate's father and mother are to be considered the same as if they were brothers and sisters of the intestate. Section 9 provides that "the same law of inheritance prescribed in the last section [§ 8] shall prevail as to the other direct lineal descendants of *every brother and sister of the intestate whenever such descendants are of unequal degrees.*" In the present case the descendants are of unequal degrees; and sections 8 and 9 taken together provide that in such cases the descent is to be to the lineal descendants of the brothers and sisters (of the intestate, or of his father or mother as the case may be) to the remotest degree; and consequently in the present case the stocks from which the distribution is to be made are the uncles and aunts of Oakley Pugsley.

The following points are submitted. I. That Benjamin Pugsley acquired no estate or interest in the premises under the devise in question. "The testator's intention ought to be collected from the words used in the will; and words which he has not used cannot be added." "Courts of law and equity are very cautious in admitting parol evidence, upon the construction of a will. It has been admitted to ascertain the person where there are two of the same name, or where there has been a mistake in the christian or surname," and "to ascertain a *person or thing.*" (1 *Bridgman's Index*, 610, *tit. Devise* 16, § 628, *and the cases there cited. See also Powell on Devises, ch.* 12.

"*Of parol declarations and averments respecting devises.*" *vol.* 1, *p.* 466, *&c. and cases there cited in the notes.*) The intention of the testator is to be collected from the whole will; and as a will of lands must be in writing, such collection of the testator's intention must be derived from the will itself, for no averment or parol evidence can be admitted to explain any thing dubious upon the face of the will, except in a few cases which will be mentioned hereafter. (6 *Cruise's Dig.* 158, *tit.* 38, *Devise, ch.* 9, § 5, *and the cases there cited.*) In the case of an *ambiquitas latens* an averment supported by parol evidence is admissible to explain a will. (*Id.* 165, *tit.* 38, *Devise, ch.* 9, § 26, *and the cases there cited.*) To the general principle that "words which the testator has not used cannot be added," there is no exception. To the general principle that parol evidence cannot be admitted upon the construction of the words used, there is an exception; parol evidence will be admitted where there is an ambiguity; and it is allowed to ascertain the person for whose benefit the devise was intended, or to ascertain what was intended to be devised. Unless the words "*Benjamin Pugsley,*" (which the testator has not used) are added to the devise in question there is no ground whatever for claiming for Benjamin any interest in the premises, under the devise; and the counsel for the plaintiffs are called upon to cite any adjudicated case, or any dictum, where a single word has been added to a devise. If an addition is made to a devise, then the will, so far as the addition goes, is not in writing but by parol; and can a will be made part in writing and part by parol? If it can, let the counsel show some adjudication to that effect. Parol evidence may be admitted to explain an ambiguity, but cannot be admitted to correct a mistake where there is no ambiguity. (*Jackson ex dem. Van Vechten and others* v. *Sill*, 11 *John.* 201.) In this case the testator devised to his wife during widowhood "*the farm which I now occupy,*" &c. and parol evidence was offered, to show that the testator intended to include the farm he occupied and a tract of land adjoining, under lease; and that by *mistake* of the person who drew the will, and contrary to the *instructions* of the testator, the tract under lease was not included. Mr. Van

Vechten, who drew the will, stated that the instructions of the testator were repeated and unequivocal that he intended to devise all his real estate in Watervliet, and that it was his [Mr. Van Vechten's] impression that the testator occupied the tract leased. Chief Justice Thompson, who delivered the opinion of the court, states, "The will was drawn by Mr. Van Vechten under a misapprehension of facts; it is therefore a clear case of mistake. I have industriously searched for some principle that would bear me out in letting in the evidence offered, but I have searched in vain, and am satisfied the testimony *cannot be admitted* without violating the wise and salutary provisions of the statute of wills, and breaking down what have been considered the great landmarks of the law on this subject." Parol evidence is inadmissible to *supply* or contradict or vary the words of a will, or to *explain the intention of the testator*, except there is a latent ambiguity arising dehors the will as to the person or subject meant to be described, or to rebut a resulting trust. (*Mann* v. *Ex'rs of Mann*, 1 *John. Ch.* 231.) In this case the testator bequeathed to his widow "all the rest, residue and remainder of the moneys belonging to his estate at the time of his decease." Parol evidence was introduced showing that the testator *intended* by the words used to include "moneys due on bonds and mortgages." The chancellor decided that such parol evidence was inadmissible; and his decision was affirmed on appeal. (*See Mann* v. *Mann*, 14 *John.* 1.) These two cases, *Jackson* v. *Sill* and *Mann* v. *Mann*, settle the law in this state in relation to the admissibility of parol evidence in the construction of a will. In these two cases there was no question as to the *intention of the testator*, and the proof was clear that there was a *mistake;* but in neither case was *parol evidence admitted* to correct the mistake. In the present case the evidence brought forward to show the *mistake* is so vague and uncertain that no reliance can be placed upon it, even if it were admissible. Mr. Findley, who drew the will, in answer to the 1st question says, 'I judge *from reading the will* that he intended to include them all; whether *his* or *my* mistake I don't know. I have no recollection on the subject *except what is contained in the will;*

my memory is oblivious on that point." And in answer to the 2d question he says, "I am at a great loss to determine, reflecting on the two clauses and the circumstances existing at the time of making the will, *whether he omitted* to name Benjamin in the first clause, or whether *I* inserted the words "the said" by way of mistake, in the next clause; or whether *he intended only three in first clause and four in the second*, and *I* made the mistake." On his cross-examination he was asked, "At the time of the execution of the will did you read it as it is, to the testator, from beginning to end?" He answered, "Yes sir, I always do that from beginning to end." The testimony of James Hyde and George Hyde could under no circumstances be admitted, so far as they relate to the instructions given by the testator to Mr. Findley. If proof of those instructions could be received it must be given by Mr. Findley; they cannot be allowed to state what the testator told Mr. Findley. As to the declarations made by the testator *after the making the will*, they could in no case be admitted to aid in the construction of the will.

II. Under the devise in question, James Pugsley became entitled to one-third of the premises in dispute and no more; and the other two-thirds descended to the heirs at law of the testator. The devise is to Samuel, William and James, and had they all survived the testator they would *each* have become entitled to *one-third;* there being no provision that in case of the death of either, his share should go to the survivors. James can have no claim to any part of the shares of Samuel and William. The devise of the *two-thirds* to Samuel and William *lapsed* by their death before the testator, and as a necessary consequence descended to the testator's heirs at law. It is a rule that if the devisee die before the devisor, the devise becomes void. (6 *Cruise's Dig.* 150, *tit.* 38, *Devise, ch.* 8, §§ 9 *to* 27, *and cases there cited.*)

III. The testator having acquired his title to one-half of the premises by descent from his brother Isaac, the one-half of that part of the premises which did not pass by the devise in question, descended to his heirs at law; as well those on the part of the mother as those on the part of the father. The canons of descent applicable to the present case are found in the re-

vised statutes, *part* 2, *ch.* 2, §§ 10 *to* 13, 29. (*Vol.* 1, *p.* 752.) The heirs at law of the testator are the children, and the descendants of deceased children, of both the father and mother of the testator. By the provisions of the revised statutes, above referred to, the heirs on the mother's side are excluded when the inheritance shall have come on the part of the father; and the heirs on the father's side excluded when the inheritance shall have come on the part of the mother; and where the inheritance has not come on the part of either the father or mother, it shall descend to the brothers and sisters both of the father and mother, and to their descendants, in the same manner as if all such brothers and sisters had been brothers and sisters of the intestate. (§ 13.) On the part of the defendants it is admitted that as to one-half of the premises, the inheritance came to the testator on the part of his father; and that the heirs on the mother's side can have no interest in that part; but it is contended that as to the other half the inheritance has not come on the part of either father or mother, and therefore it descended to the heirs on the side of both father and mother. That the inheritance, as to one-half of the premises, came to the testator by descent from his brother Isaac is not questioned; it did not therefore come to the testator on the part of either the father or mother, and thus comes within the provisions of § 13. By § 29 of the revised statutes, above referred to, the expressions "where the estate shall have come on the part of the "father" or "mother" as the case may be, shall be construed to include every case where the inheritance shall have come "by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent." If it should be contended that in this case, as to the one-half derived by descent from the testator's brother, the heirs on the mother's side should be excluded, because the inheritance came by descent from a relative of the blood of the father; it might with equal propriety be contended that the heirs on the father's side should be excluded; for was not Isaac L. Pugsley, by descent from whom, this half came, a relative of the testator of the blood of his mother? Where the inheritance came by descent

from a relative of the blood of father and mother equally, there it must descend to the brothers and sisters (and their descendants) of both father and mother: the heirs on neither side can be excluded. In the case of *Jackson* v. *Green*, (7 *Wend.* 333,) Chief Justice Savage states that the descent from brother to brother is immediate.

In order to carry out the principles above stated, it is contended that the court should decree, that Benjamin Pugsley took no interest in the premises under the devise in question; that James Pugsley took an estate in fee in one-third only of the premises. That the other two-thirds descended, to the heirs at law of Oakley Pugsley; that the heirs on the father's side are entitled to one-half of the part which descended, to the exclusion of the heirs on the mother's side; that the heirs on the father's and mother's side are together entitled to the other half of the part which descended; that the distribution among the heirs is to be made *per stirpes* and not *per capita;* that the stocks from which the distribution is to be made are the *uncles and aunts* of Oakley Pugsley, (the brothers and sisters of his father and mother,) or his *cousins*, (children of those brothers and sisters,) it being in evidence that, at the death of Oakley, all his uncles and aunts were dead, and that there were living persons who were children of his uncles and aunts.

S. B. Strong, J. This is an action for the partition of a tract of land known as the Cow Neck farm, in the town and county of Westchester, between the plaintiffs and defendants and other owners who, or whose interests, are unknown. One Talman Pugsley was at the time of his death seised in fee simple absolute of the farm, which he had purchased from Stephen Leggett. Talman Pugsley died intestate, and the land thereupon descended to his sons, Isaac L. Pugsley and Oakley Pugsley, who were his only heirs at law. Isaac L. Pugsley died intestate and without descendants, in the lifetime of his brother, and his half of the farm descended to Oakley Pugsley, who thereupon became and continued to be until the time of his death, seised in fee of the whole of it. Oakley Pugsley made

a will containing with other provisions the following consecutive clauses:

"First. After all my lawful debts are paid and discharged, I give and bequeath unto William Pugsley, Samuel Pugsley, Benjamin Pugsley and James Pugsley, sons of Samuel Pugsley of North Salem, all my household furniture, farming utensils, and what stock I have on the farm where I now reside.

I also give and bequeath unto William, son of James Pugsley of Ossining, my large silver tankard, also eighteeen silver spoons—nine large ones, and nine small ones— also four silver watches and sugar tongs.

I do give and devise unto Samuel Pugsley, William Pugsley and James Pugsley, near Cayuga lake in this state, the farm where I now reside, in the town of Westchester aforesaid, containing about one hundred and sixty acres, called the Cow Neck farm.

I do also give and devise unto the said last named Samuel, William, Benjamin and James, two houses and lots: One of said houses is numbered (31) thirty-one Hester street, and the other, No. 14 Norfolk street, in the city of New York; also one house and lot number 353 Division street."

The will, after specifying several intermediate devises and bequests, contains the following clause:

"I do also give unto William Pugsley, Samuel Pugsley, Benjamin Pugsley and James Pugsley, sons of Samuel Pugsley, of North Salem, Westchester county, the personal property aforesaid, and no more."

There was a codicil to the will, but it had no reference to the Cow Neck farm, nor did it contain any provision affecting the questions involved in this action. There was no residuary devise. The testator died in 1853, leaving his will and codicil in full force, and they were subsequently duly proved before the surrogate of the county of Westchester. He had not at the time of his death any living ancestor, nor any descendant, brother or sister, or any descendant of a brother or sister. His heirs at law were the descendants of the brothers and sister of his father, Talman Pugsley, and of the brothers and sisters of his mother, whose maiden name was Sarah Oakley. The

nearer heirs on each side were his first cousins. Several of his former first cousins had died, some without, and others leaving descendants.

The action was referred, for the purpose of ascertaining the facts, and those which I have stated were proved before the referee, and reported by him, together with his conclusions on various questions of law. One of his conclusions is that, as well from the parts of the will which I have quoted as from the extrinsic evidence which he received, the testator intended to, and did, in effect, devise a portion of the farm in question to his cousin Benjamin Pugsley, who is one of the defendants in this suit, and claims such interest. The counsel for several of the other parties objected to the admission of the parol evidence and excepted to the conclusion adopted by the referee. The questions resulting from this action of the learned referee are important, and were discussed by the counsel who appeared before me, with great ability.

There is no obscurity in the devise itself, nor in its application. The farm is accurately designated, and the three devisees are appropriately named. There may be some doubt whether the testator did not intend to give the farm to the three devisees named and Benjamin Pugsley, from the bequest to the four of the household furniture, farming utensils and stock on it, and from the phraseology of the clause next following the devise in question, in which he says: "I do also give and devise unto the said *last* named Samuel, William, *Benjamin* and James" three houses and lots in the city of New York. It is certainly singular that the testator should have given the farm to three of his cousins, and the furniture, stock and utensils on it to the three and another person, and it raises an inference that there must have been some mistake; but neither of the provisions would indicate in which of them the mistake was made. The presumption would seem to be that the greater accuracy would qualify the more important gift of the real estate. Then as to the words in the succeeding clause "the said last named," they certainly raise a presumption that the four were named together in what immediately precedes it. That is weakened,

however, by the consideration that the expressions "last named" were necessary to designate Samuel, James and William, as other persons having the same names had been previously mentioned. The epithets may have been designed for them only, as they were unnecessary for Benjamin, who was the only person of that name mentioned in the will. Whatever ambiguity existed, however, was apparent from the face of the will; and the general rule in such cases is that it is not susceptible of explanation from extrinsic, parol evidence. The will must then be its own expounder. Lord Bacon, after stating in his 23d rule the maxim, "*ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*," observes, "There be two sorts of ambiguities of words: the one is ambiguitas patens and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.

"Ambiguitas patens is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed." It is apparent from those considerations that an obscurity purely instrumental cannot be explained by parol evidence. If that is so great that it cannot be discovered with reasonable probability who, or what is meant by the testator, the provision is deemed insensible, and the proposed gift must fail altogether. External evidence is necessary, and always admissible, to identify the person or thing sufficiently described to make the devise or bequest effectual. If that points to but one object, or to but one individual clearly designated in the will, that controls. No evidence can then be received that any other person or thing was intended. But if the extrinsic evidence for identification produces uncertainty as

to either, that may be removed or explained by other testimony. The difficulty may be removed by the same instrumentality by which it is produced. The admissible evidence in such cases is always explanatory of person or thing, actually expressed in the will. No parol evidence can be received to prove an additional or different subject matter, or some other donee. If that should be allowable, the will would be partly in writing and partly by parol, and as to the latter, it would be without any of those solemnities which our statutes wisely require to render it effectual. Much of the evidence adduced before the referee went to show the intention of the testator, as evinced by his declarations at different times, and his instructions when the will was drawn to include Benjamin Pugsley among the devisees of the Cow Neck farm. It is undoubtedly desirable that the intentions of a testator should prevail, so far as they can do so consistently with conservative rules. But it is very essential that there should be an intimation of the intent in the will, and that the proof should be confined to what is expressed. In other words, that such proof should be strictly explanatory. There can be but little danger in allowing explanations of what is written, but it would be hazardous in the extreme to permit alterations or additions to be made from the uncertain recollections of witnesses, and particularly in reference to such evanescent matters as conversations. The parol evidence before the referee in this case was inadmissible, first, because it was designed to explain a patent ambiguity; and secondly, because it would, if it could have any effect, create a new devise.

If Benjamin Pugsley took any interest in the premises, under the will, it must have been by implication. That is a question of law which could not be elucidated by any extrinsic evidence as to the intention of the testator, nor justify its admission. As to that, what is stated in the instrument must control. The rule in such cases is well expressed by Mr. Jarman in a note to *Powell on Devises*, (*Vol.* 1, *p.* 336,) as follows: "that if a testator *unequivocally* refer to a *disposition* as made in that his will which in fact he has not made, the court will regard it as an inadvertent omission, and will

accordingly supply it." In this case the testator does not unequivocally, or at all, refer to a disposition in favor of Benjamin Pugsley of any part of the farm in question, as actually made. The language used by him simply raises a conjecture that he may have supposed that he had included his name as one of the devisees, but it is too remote either to alter the estate expressly given to others, or to confer any upon him. My opinion is, that Benjamin Pugsley took no part of the Cow Neck farm, under the will.

The referee states that William Pugsley, one of the proposed devisees, died before the will was made, and that Samuel Pugsley, another of such devisees, died in the intermediate time between the date of the will and the death of the testator, and he correctly concludes that the devise to Samuel lapsed. I do not agree with him, however, that in consequence of such premature death of William, the devise must be read as if his name had been omitted, and as giving the entire estate to the others. That would have been the rule had the devise been to a class, in general terms, without any further designation, such as children, brothers, or sisters of a particular individual, although it should contain a less number than what was expressed by the testator at the time. That is well, and no doubt correctly settled. The fair inference in such cases is, that the testator intended to give the entirety to those who might come within the designation, whatever might be the number; and indeed the application would be precisely according to the terms and effect of the language. The same rule prevails where the devise is to several as joint tenants. But the rule is different where, as in this case, the devise is to several *nominatim*, and in effect as tenants in common. Then the gift is of a specific portion to each, and if that intended for either fails in consequence of his earlier decease, it descends to the heir. (*Creswell* v. *Cheslyn*, 3 *Bro. P. C.* 240, *2d ed.* 123.) The rule is that the heir always takes what is not effectually devised to others. (*Wright* v. *Hall*, *Fort.* 182. *S. C. under the title of Wright* v. *Horne*, 8 *Mod.* 224. *Roe* v. *Flood*, *Fort.* 184.) I must therefore decide that James Pugsley, the

only surviving devisee named in the will, took thereby only the one-third part of the Cow Neck farm. The referee came to that conclusion, although for a different reason.

I agree with the referee that the remaining two-third parts of the premises descended to the heirs at law of the testator, and that one of these third parts descended to the descendants of the brothers and sisters of his father. Clearly as to such third the inheritance came to him on the part of his father. But as to the remaining third part, being the half of what was not (as it turned out) effectually devised, that did not come to the testator on the part of his father, but it came to him from his brother. Property may be said to come to one on the part of his father, when it descended directly from the father, or through him, as a medium; but certainly not where it came to him by descent immediately from another. Thus, if the property descended from any blood relative of the father more remote than the brother of the propositus, it must come through the father as a medium, and it is on *his* part. But the descent from brother to brother is, by the rule of the common law, considered to be immediate, that is, from one directly to the other, and not through, or on the part of, the father. (*Collingwood* v. *Paca*, 1 *Ventr.* 413.) The rule was recognized as existing in this state, by Chief Justice Savage, in *Jackson* v. *Green*, (7 *Wend.* 333.) The learned chief justice in that case, (p. 338,) quotes as law the opinion of Lord Hale, that collateral descent from brother to brother is immediate, *taking no notice of the father;* and he adds, "Hence one brother may inherit from another, though the father be an alien, or attainted." The reason of this peculiar rule is not very obvious, but with our endorsement of the common law it must prevail until it shall be (if ever) repealed. Under that rule I must decide that the one-third part of the farm in question, being the half of what did not pass under the will, descended to both the paternal and maternal collateral relatives of the testator.

It was insisted by one of the counsel, on the argument, that whatever descended to the children or other descendants of the uncles and aunts should be divided into as many shares as there

were uncles and aunts who had left descendants living at the death of Oakley Pugsley, and that the descendants of each should take what would have been inherited by his ancestor if living. I do not so construe our statute of descents, (1 *R. S.* 751.) By the 7th section it is provided that where the descent is to collateral relatives all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, *however remote from the intestate the common degree of consanguinity may be.* As in this case all the uncles and aunts died in the lifetime of the (partially) intestate, his nearest surviving relatives were his first cousins, and if all his first cousins had survived him they would have inherited equal parts of what descended to them respectively. But as several of them had previously died, the question arises whether the cousins must not be assumed as the stock, and the inheritance be divided into as many equal shares as there were first cousins living, or who had died leaving descendants. My opinion is that such is the division required by our canons of descent. The 8th section of our statute of descents provides that where the descent is to brothers and sisters, and the descendants of any of them who may have died, each living brother and sister shall inherit the share which would have descended to him or her had all the brothers and sisters who shall have died leaving issue been living, and so that such descendants shall inherit the share which their parent would have received if living. The 9th section directs that the same law of inheritance prescribed in the preceding section shall prevail as to the other direct lineal descendants of any brother and sister of the intestate to the remotest degree whenever such descendants are of unequal degree. Taking the 7th, 8th and 9th sections together, the rule is established that where the inheritance descends to or through brothers or sisters, or both, the primary division shall be made between the nearer surviving relatives and the descendants of those of the same degree who may have died, so that the descendants of each shall collectively take the share which would have fallen to their ancestor had he or she been living. That makes the two canons, one relating to descendants (sections 3 and 4) and the other to

collateral relatives, substantially the same. The 10th section of the same statute provides that when the inheritance shall be to or through the brothers and sisters of the father, whether all of them shall be living, or some of them shall be living and others shall have died leaving descendants, or all of them shall have died, all, any or either of them leaving descendants, the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate; and the 13th section directs that when the inheritance shall descend to or through the brothers and sisters both of the father and mother, it shall go to such brothers and sisters in equal shares, *and to their descendants*, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. The directions as to the division between the nearer living collateral relatives and the descendants of the dead of the same degree, are not as specific as those in reference to the descendants of the intestate, but it is evident that it was designed to make the rules homogeneous, and there is sufficient in the statute to effectuate such intent. My conclusion is that the division in this case must be made according to the indicated interpretation of our canons of descent.

The four plaintiffs are seised in fee under the conveyance to them from James Pugsley, son of Samuel Pugsley, and from James Underhill, of the undivided portions of the Cow Neck farm to which the former was entitled as one of the devisees and also as one of the heirs at law of Oakley Pugsley, and the latter as one of such heirs, and the plaintiffs Hyatt and Cobb are in addition seised in fee under a conveyance to them from Isaac Pugsley, another heir of Oakley Pugsley, of the share which had descended to him at the time of such conveyance. It is impossible to ascertain from the report of the referee the precise interest which each or any of the heirs of Oakley Pugsley took, as such, in the premises in question. It is necessary, as I conceive, that the estate of each known owner, or of the defendants or some of them, collectively when their rights between each other are disputed, (*Phelps* v. *Green*, 3 *John. Ch.* 302,) should be stated in the judgment. There can be no objection to a

statement that certain definite portions belong, collectively, to owners who are unknown. They may be described in general terms, as the descendants of a person deceased. In the instance of unknown owners, however, the statute requires a direct allegation in the complaint that they are unknown, and also the publication of a notice to them. (2 *R. S.* 319, § 12; 329, § 84.) The averment in the complaint in this action that there are certain unknown owners, although their exact interests are not specified, may be sufficient to authorize the subsequent proceedings as to them, and a judgment to be entered which shall bind their interest, if the requisite notice has been published. If no such notice has been published, it may yet be done, and the subsequent proceedings must be readopted. The plaintiffs cannot, as they have attempted in their complaint, call on the devisees who are known and named by them, to answer in behalf of, or in any manner to represent, the heirs at law of their deceased relative, who are unknown.

The case must go back to the referee to ascertain and report the precise interest of each plaintiff, and also, so far as it can be ascertained, of each other known owner, and also of the unknown owners, or of each class of those who are wholly or partly unknown. If from such report it shall appear that there are owners who are known but not named as parties to this action, they may be brought in as new parties, and the names of the defendants who never had, or who have not now, any interest in the premises, if it should appear from the report that there are any such, may be struck out.

The reasons given by the referee for the sale of the farm, are satisfactory. If the renewed report of the referee shall be satisfactory as to the interests of the parties and the unknown owners, and the requisite proceedings have been adopted to conclude the latter, a judgment may be entered, upon filing the report, conformable to the principles which I have indicated, and for a sale of the premises by Calvin Frost, Esq. who has been selected by the parties as a referee for that purpose.

Further directions will of course be given, if necessary.

[Kings Special Term, December 2, 1856. *S. B. Strong*, Justice.]

23 304
125a 36
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114a 527

THE PEOPLE, *ex rel.* Hawes, *vs.* WALKER.

Where an action is brought in the name of the people, on the relation of an individual, to test the right to an office, the name of the relator must be joined with the people, as plaintiff. But an omission to join the relator as a party may be cured by amendment, without costs.

An averment, in a complaint, that a meeting was *duly convened* implies that it was *regularly* convened, and, if necessary to its regularity, that it was an adjourned meeting.

When a private authority is conferred, on several, all must be present, and all must concur, unless provision be otherwise made.

When a public authority is conferred on individuals (not on a court) who are to act judicially, all must confer together, but a majority may decide.

In public cases not of a judicial character, a majority make a quorum, if a majority may decide.

Where a statute required that a commissioner of jurors, for the city and county of New York, should be appointed by the supervisors of said city, the judges of the superior court, and the judges of the court of common pleas, without saying any thing as to the number which should constitute a quorum, or whether a majority either of the whole body, or of the component parts, should be sufficient to appoint; *it was held*, that after due notice to all the persons mentioned, a majority of the whole number constituted a quorum, and were competent to decide any matter on which the whole body had authority to act; and that they therefore had the power to remove an individual from the office, and appoint another in his place.

Held also, that it was not essential to the validity of the appointment that all the judges of both the superior court and the common pleas, or a majority of each, should be present at the election.

ACTION to test the right of the defendant to exercise the office of commissioner of jurors, for the city and county of New York; to which office the relator, Hawes, claimed to have been duly appointed, in the place of the defendant. The case came before the court on demurrer to the complaint.

MITCHELL, J. The complaint is in the name of the people alone on the relation of Mr. Hawes, and is to test the title of the relator, or of W. A. Walker, to the office. In such case, by the code, "the name of the relator shall be joined with the people as plaintiff." (*Code*, § 434.) This defect may be cured by amendment without costs. The complaint alleges that "on the 4th day of March, 1850 at a meeting duly convened, of the

judges of the supreme court of the city of New York, the judges of the common pleas in and for said city, and the supervisors of the city of New York, the defendant was removed from the office of commissioner of jurors, theretofore held and exercised by him, and the relator duly appointed to that office." The complaint then shows that at that meeting there were present the mayor, the recorder, all the supervisors of the county, four of the six justices of the superior court, and one of the three judges of the common pleas; that of the absent judges, one of the superior court and one of the common pleas were personally served, on the 2d of March, with a notice to attend the meeting, and one other of each of said judges being temporarily absent from the city, was served on the same day with a like notice by leaving it at his residence, or place of business.

As the complaint shows that the defendant previously held the office, and does not set up any objection to his previous title, but only claims that he usurped the office "in continuing to hold" it after the election, it was not necessary for the defendant to set forth his title; he could rely on his prior title thus admitted, unless the plaintiff has shown a better title in the relator.

No question was raised as to the sufficiency of the notice. The complaint states that the meeting was "duly convened;" this would imply that it was regularly convened, and, if necessary to its regularity, that it was an adjourned meeting. No length of notice is prescribed by the statute, and two days' notice for persons all residing in the city, and whose duty it is to reside in the city and to be ready to perform the functions of their office, is not so clearly short notice that on a pleading it could be pronounced insufficient. In *Whiteside* v. *The People*, (26 *Wend.* 635,) the notice served on the judges was at 2 o'clock P. M. for the hour of 5 P. M. of the same day. They attended in fact, but withdrew as soon as the balloting was about to commence. Nor was it necessary that the notice should be personal; that is required when the object is to bring a party into contempt, or to subject him to the jurisdiction of a court; not when it is to give him the opportunity of exercising a right. This brings us to the question really in controversy in this

cause, whether it was essential to the validity of the appointment of the relator that all the judges of both the superior court and the common pleas, or a majority of each, should be present at the election.

The statute is that the commissioner is "to be appointed by the supervisors of said city, the judges of the superior court, and the judges of the court of common pleas for said city and county." (*Laws of* 1847, *ch.* 495, § 2.) It says nothing as to the number which shall constitute a quorum, nor whether a majority either of the whole body, or of its component parts, is sufficient to appoint. These questions are left to be decided on general principles, and the courts are to ascertain what was the intention of the legislature from any legitimate source of interpretation. When a power is submitted to three or more persons, under an agreement of individuals, and no other provision is made in the agreement, all the persons to exercise the power must not only meet together, but all must also agree in the result, or nothing else can be done by them. This is on the ground that such is the intention of those submitting to the control of the others, and not from any arbitrary or technical rule; for the parties can, by agreement, adopt, and frequently do, in arbitration, adopt a different rule. But it is equally well established, that "where a number of persons are intrusted with a power, not of mere private confidence, but in some respects of a general nature, and *all* of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole." (*Eyre, C. J., in Grindley* v. *Barker*, 1 *Bos. & Pull.* 236, *and adopted in our state in Green* v. *Miller, in* 1810, 6 *John.* 39.) The language quoted speaks of *all* being regularly assembled; not because it is always necessary that all should be assembled, but because in some cases that is necessary, and the court was discussing the right of the majority to decide. In fact the very next words of Eyre, C. J., in the case, though not quoted in Johnson's reports, are: "The cases of corporations go further; there it is *not necessary* that the *whole* should meet; it is enough if notice be given; and a majority or a lesser number, according as the charter may be, may meet, and when they have met, they become just as

competent to decide as if the whole had met. In *The King* v. *Miller*, (6 *D. & E.* 269,) Lord Kenyon said, that when there is a definite body in a corporation, a *majority* of that definite body must not only exist at the time when any act is to be done by them, but a *majority* of that body must attend the assembly when such act is done. This language implies that the attendance of a majority would be sufficient; it is, however, only a *dictum*, as the decision was that the corporation was dissolved, as a majority of the forty-eight burgesses had ceased to exist. Yet if were not correct in principle, the corporation would have been dissolved by the death or resignation of any burgess. The charter gave the power of choosing the mayor and bailiff to the burgesses, and the mayor and bailiff, or the major part of them. It did not define what would be a legal number to constitute a meeting; but as the majority could choose by virtue of the charter, it was informed that a majority assembled, and concurring in the election, the assembly was valid although all were not present. The English charters (it is believed) seldom state expressly what number shall constitute a quorum, but still it is held that it consists of a majority, when a majority is authorized to decide. A different rule prevails when persons are appointed by the law to act as *special* tribunals of a quasi judicial character. Then both parties are entitled to the presence of all the judges, and to have the benefits of the consultation of each with every other. All must therefore meet together and consult, but then a majority may decide. (*Grindley* v. *Barker*, *supra*.) In the *Attorney Gen.* v. *Davy*, (2 *Atk.* 212,) three out of twelve persons had power to choose a chaplain. Two of the three chose a chaplain, the third dissented, and the question was whether this was a good choice. It was held to be good. Lord Hardwicke said, "It cannot be disputed that wherever a certain number are incorporated, a major part of them may do any corporate act; so if *all are summoned* and *part* appear, a major part of those that appear may do a corporate act, though nothing be mentioned, in the charter, of the major part." This case was approved by Eyre, Ch. J., in *Grindley* v. *Barker*, and applied by him to special tribunals, so far as it ruled that a majority could contro'

He also says, "that part of the law of corporations applies to this case; that with regard to powers not merely private, which are to be exercised by many persons, provided a *sufficient number* be assembled, the act of the majority concludes the minority, and becomes the act of the whole body." He does not say, "provided all be assembled," but "provided a *sufficient* number be assembled." In *Ex parte Willcocks*, (7 *Cowen*, 402, 409,) the case of an election of directors of the Utica Insurance Company, the president and one director had appointed the inspectors of the election, and it was held void. Savage, Ch. J., said, There must at least a majority of the directors be present to constitute a board. We do not understand the words, "A majority of the directors *present* shall be competent, or as amounting to a declaration, that a minority, however small, may decide. It leaves the number competent to form a *quorum* to be determined by the rules of the common law, which, in no case of this kind, is satisfied with less than a majority. The general rule also is, that to make a quorum of a select and definite body of men *possessing the power to elect*, a majority, at least, must be present." This decision seems to adopt another distinction; that at common law a *majority* of a definite body constituted a quorum, and that this is the general rule of a body possessing the *power* to elect. If the body be indefinite in number, then "a majority of those who appear at a regular meeting constitute a body competent to transact business." (*Field* v. *Field*, 9 *Wend.* 394, 403.) These cases are also approved in *Angell & Ames on Corporations*, 396, 398, *&c.*

In England, it seems to be understood that when a corporation consists of a definite number, a majority will constitute a valid assembly of the corporation. In *Blucket* v. *Blizard*, (9 *Barn. & Cr.* 851,) Bayley, J., says, "I take it to be a general rule of law, that when a *public trust* is to be executed by a definite number of persons, it must be executed at a meeting when a *majority* of that number is *present*, unless there be a usage or custom to the contrary." He adds: "In *Rex* v. *Burton*, (6 *T. R.* 592,) the statute having enabled the church wardens and overseers to contract for the providing for the poor, it was held

not to be necessary that all the church wardens and overseers should contract, but it was considered to be clear that the concurrence of a majority was essential. In *Withnell* v. *Gartham*, (6 *Term R.* 388,) a power granted by deed to appoint a schoolmaster, given to the vicar and church wardens, was held to be well executed by the vicar and a majority of the church wardens. Littledale, J., said: "It is a well established rule that in order to constitute a good corporate assembly in the case of a corporation consisting of a definite and indefinite body, there must be *present* a *majority* of that number of which the definite body consists, although it is not necessary that there should be a majority of the indefinite body. By analogy to corporations and other cases where public, in contradistinction to private, trusts are to be executed by definite bodies, there ought (to constitute a good assembly of a select vestry) to be *present* a *majority* in number of the persons who constitute the select vestry." So Parke, J., concurs, and says: "I think that in all other cases the *general* rule of construction applied to charters whereby the king has committed to a definite body the care of executing a public trust, ought to prevail."

Ch. J. Nelson understood the English law as not requiring all to be present, and said that, individually, he was not disposed to regard the revised statutes (2 *R. S.* 555, § 27) as conclusive on the question; and spoke of our "cases," or rather *dicta*, as seeming to have followed a suggestion in *Grindley* v. *Barker*, (1 *Bos. & P.* 229,) which gives countenance to the idea that all must be present, and then a majority may act. He also said that the revisers did not intend to *alter* the rule respecting an authority of a general and public nature, but they mistook it as understood in England at the time, and that it had never been otherwise *determined* in this state. He held with the rest of the court in that case, (*The People, ex rel. Upham*, v. *Whiteside*, 23 *Wend.* 9,) that the act of 1836, (*ch.* 459, § 2,) declaring that "the county treasurer may be removed from office" by the *joint ballot* of the judges of the county courts and board of "supervisors at the annual meeting of the supervisors," did not authorize the supervisors to elect when the judges declared they would

not go into an election, and left the room when the balloting was about to commence. He said that the act not only "confers the power upon the two" bodies in joint ballot, but a majority of each must be "present and voting," and spoke of each board as an integral part of the elective body. The court for the correction of errors reversed the decision, (26 *Wend.* 634,) and the leading opinion maintained that, as the voting was to be by joint ballot, and not by concurrent resolution, when the meeting was convened, the bodies out of which it was formed were merged and became one; (*Id.* 641;) that the law did not contemplate the separate action of either the judges or supervisors; that the removal or election was *not* to be at the pleasure of both bodies; that it was not necessary for both bodies to concur, and that the withdrawal of the judges, under the circumstances, was unavailing; that the rule in English municipal corporations, treating each branch of the corporation as an integral part, when concurrence was essential to any act, was adopted there in imitation of their form of government, and did not apply here. The section of the revised statutes referred to by Ch. J. Nelson, (2 *R. S.* 555, § 27,) is in effect that whenever any power or duty is confided by *law* to three or more persons it "*may be exercised* by a majority of such persons upon a meeting of all, unless special provision is otherwise made." The language, and "*may be* exercised," is permissive, not restrictive; it allows a majority on a meeting of all, to act, but does not declare that a meeting of all shall be essential to the validity of the meeting. It leaves that question open. So also does the note of the revisers. They spoke of the decision in 6 *John.* 39, as holding that "a power for a public purpose might be exercised by" a majority at a meeting of the whole.

In *Downing* v. *Rugar*, (21 *Wend.* 178,) Cowen, J., said, although it was not material to the case, that "in the exercise of public as well as private authority, whether it be ministerial or judicial, all the persons to whom it is committed *must* confer and act together, unless there be a provision that a less number may proceed." And he referred to *Green* v. *Miller*, (6 *John.* 89;) *Grindley* v. *Barker*, (1 *Bos. & P.* 236;) 2 *R. S.* 458, § 27,

2d ed.; 3d ed. 780, *notes*; *Rex* v. *Burton*, (3 *John.* 592, 4.) These cases do not sustain his position, and the English cases are not so understood in England. (*See* 9 *Barn. & Cr.* 851, *above.*) This is probably one of the *dicta* referred to by Judge Nelson.

In *Sargent* v. *Webster*, (13 *Metc.* 504,) Shaw, Ch. J., said, "In ordinary cases, when there is no other express provision, a majority of the whole number of an aggregate body who may act together constitute a quorum, and a majority of those present may decide any question upon which they can act.

Is it not the result of these cases then, *First.* That when a private authority is conferred all must be present, and all must concur, unless provision be otherwise made. *Second.* That when a public authority is conferred on individuals (not on a court) who are to act judicially all must confer together, as that is the object of having more than one or two, but that a majority may decide. *Third.* That in England each part of their municipal corporations is treated as an integral part of the corporation, and in comparing them to the king, lords and commons, neither can act without the others. *Fourth.* But here no such rule of allowing a negative on each, prevails when the voting is to be on joint ballot. *Fifth.* That in England, when a majority of a corporation may decide, then if notice be given to all and the number of the corporation is definite, a majority attending constitute a valid assembly, and if the number of the corporation be indefinite, those who attend, though less than a majority, may also act. *Sixth.* And the same rule applies to other public bodies not acting judicially, especially if engaged in the election of officers. *Seventh.* There are dicta in our courts requiring all to be present in the last two cases, but no express decision to that effect; and there are, apparently, opinions of Chief Justice Nelson, and of Chief Justice Savage to the contrary, confirmed by the English opinions and the authority of Angell & Ames. *Eighth.* That the revised statutes allow in all cases of public authority a majority to decide if all the persons entitled to act be present, unless there is some special provision to the con-

trary; but do not lay down a rule that all must be present in cases where the common law before did not make it necessary.

The English authorities being clear on the subject, as to what the common law is in such a case, and the *dicta* here opposed to each other, the weight of authority seems to be in favor of the English rule: that in public cases, not of a judicial character, a majority make a quorum, if a majority may decide. This best comports with the spirit and the general tenor of our laws, and with our republican institutions. It is not to be supposed that the legislature, when conferring a power of removal and appointment on twenty-nine different men, intended that two out of the whole number should be able to prevent the action of the others. Yet this is so, if, as is contended, two judges of the common pleas, by being absent, prevented any valid election; or if the broad principle be adopted that all must attend, then any one, by absenting himself, can defeat the wishes of the other twenty-eight.

The elective body in this case consisted of the supervisors and the judges of the supreme court and common pleas; the first consisting of eighteen aldermen, with the mayor and recorder; the second of six, and the third of three judges. They were to meet together, and then to vote on joint ballot; so that there was no need of the concurrence of each class of voters. The law had already provided that a majority of the supervisors of any county should constitute a quorum for the transaction of business, and that all questions which should arise at their meetings should be determined by the votes of the majority of the supervisors present; (1 *R. S.* 367, § 5; *Id.* 368, § 17;) and that a general term of the superior court could be held by any two of its six judges. (*Laws of* 1849, *ch.* 124, § 7.) It is entirely contrary to the spirit of this legislation to assume that the law meant to give to one or more members of either court or of the supervisors an absolute power to prevent the action of the others. If not, then, on due notice to all, a majority of all must constitute a quorum, and be able to decide any matter on which the whole body had authority to act. This would entitle the plaintiff to judgment, on his amending his complaint.

The term of office of both parties has expired, and a new law

has been passed, not in conformity with the view of either party to this action, but requiring a majority of each of the three classes to be present, and then allowing a majority of those present to decide. (*Laws of* 1854, *ch.* 392.) Still the case is to be decided according to the former law, and the plaintiff is entitled to judgment. (5 *Denio*, 409, 444.)

Let judgment be for the plaintiff on his amending his complaint, as suggested, with leave also to the defendant to answer in twenty days on payment of costs of the demurrer.

[New York Special Term, February 14, 1856. *Mitchell*, Justice.]

Humphrey *vs.* Persons.

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39 101
40 323
36h 296

The jurisdiction conferred on justices of the peace, in respect to actions upon justices' judgments, is general, and is not limited to cases in which the amount claimed does not exceed $100.

A justice therefore has jurisdiction of an action upon a judgment rendered in a justice's court, and to render judgment for the amount due thereon, although it exceeds $100.

Although a summons issued by a justice claims damages to an amount exceeding $100, the defendant is bound to appear in the action; inasmuch as justices of the peace have jurisdiction of some actions, wherein judgments are claimed for sums over $100.

In an action upon a justice's judgment, it is not necessary that the summons should state that the complaint will be upon such judgment.

The omission of a justice of the peace to certify, in his docket, that the amounts appearing by such book to be due on the judgments therein have not been paid, to his knowledge; or to deposit such docket with the clerk of the town, on his removing therefrom, will not affect the validity of the judgments in the docket, or vary the effect of the same as evidence; the statutes requiring him to do so, being merely directory.

The fact that a justice's judgment, on which an action is brought, was recovered more than six years before suit commenced, is no cause for reversing a judgment given upon it, where the defendant did not appear in the latter suit, and plead the statute of limitations.

Although the statute applicable to justices' courts declares that in case a defendant does not appear and answer, the plaintiff cannot recover without proving

his case, the plaintiff need not disprove any defense that must be specially pleaded, to be available to the defendant.

All that the plaintiff is obliged to prove, in such a case, is, enough to entitle him to recover, if the allegations in the complaint were denied generally, by an answer.

Where a justice of the peace acquires jurisdiction of an action, his judgment, although it be voidable for irregularities thereafter committed, is not void; and will uphold a judgment given upon it in a suit commenced thereon.

The statute prescribing what entries justices of the peace shall make in their dockets, is directory; and a literal compliance therewith is not necessary, when the entries show that the justice had jurisdiction of the parties, and of the subject matter of the action; and they also show the kind and amount of the judgment given, and that it was rendered at a proper time.

THIS action originated in a court held by a justice of the peace. It was founded upon a judgment rendered by Martin Marcley, Esquire, a justice of the peace of Schoharie county, on the 28th day of July, 1842, for $92 damages, and $3.71 costs. The summons in this action was returnable on the 11th day of October, 1854, and required the defendant "to answer, in a civil action, the complaint of Robert Humphrey, *to his damage of one hundred and seventy-five dollars.*" The summons was returned personally served October 2d, 1854.

On the return day the plaintiff appeared before the justice, at the place specified in the summons, but the defendant did not appear. The plaintiff presented a complaint in writing, upon the judgment rendered by the said Martin Marcley, Esquire; in which complaint he demanded judgment against the defendant *for one hundred and seventy-five dollars.* The action was then tried, and the docket of the said Martin Marcley, Esquire, was read in evidence. It was as follows: [Title of cause.] "July 7, 1842, I issued a summons returnable on the 16th inst. at 2 o'clock P. M.—July 8, 1842, served by copy, by Henry Marcley, constable. Fees $1.12½. July 16, 1842, plaintiff appeared; the defendant did not appear. Plaintiff demanded another summons. July 16, 1842, I issued summons returnable on the 27th inst. at 2 o'clock P. M. July 20, 1842, personally served, by James McDonald, constable. Fees $1.18 July 27, 1842, plaintiff appeared in court, defendant did not

appear. Plaintiff declared upon a promissory note, to his damage of ninety-two dollars. Plaintiff calls for an adjournment, and cause adjourned to the 28th inst. at 1 o'clock P. M. July 28, 1842, plaintiff appeared in court, defendant did not appear. W. for plaintiff, John Allen. Damages $92, costs $3.46. Judgment $95.43. Transcript $0.25. $95.71." The interest on the judgment was proved to be $79.54. The docket of Martin Marcley, Esq. was proved by Tobias Marcley; who testified, "I reside in the town of Seward. I have lived there for 30 years past. Martin Marcley is my brother. He was reputed to be a justice of the peace of the town of Seward, Schoharie county, and acted as such during the year 1842. He now resides in Westchester county, and is not now in this or any adjoining county to my knowledge. Westchester county does not adjoin Schoharie county. I am acquainted with his handwriting, and have seen him write. (Plaintiff here presents docket to witness in court.) Witness says, the docket is Martin Marcley's docket, and is in his handwriting." (*See* 2 *R. S.* 270, § 248.)

The justice rendered a judgment in this action against the defendant for $172.48 damages, $2.52 costs, in all for $175. Afterwards, at about 11 o'clock A. M. on the said 11th day of October, 1854, while the justice and the plaintiff's counsel were engaged in the trial of another cause, Henry Smith, Esq. appeared for the defendant in this action, and produced his authority to appear, and asked the plaintiff's counsel to waive the judgment that the justice had rendered against the defendant, and permit him to plead; and proposed to him to pay costs, the plaintiff's witnesses being present. It does not appear, by the return, what reply, if any, the plaintiff's counsel made to this proposition, or that the justice made any statement or decision thereupon. The Schoharie county court reversed the judgment of the justice, upon the ground that the action was barred by the statute of limitations. No affidavits were presented to the county court, to show that injustice had been done to the defendant, or to excuse his default before the justice, as might have been done. (*See Code*, § 366.) The plaintiff appealed from the judgment of the county court to this court.

James E. Dewey, for the plaintiff.

W. Wells, for the defendant.

Balcom, J. Subdivision 7 of section 53 of the code confers jurisdiction upon justices of the peace, of actions on judgments rendered in a court of a justice of the peace, where such actions are not prohibited by section 71. Section 71 only prohibits actions upon such judgments for five years after their rendition; which period had expired before this action was commenced. The jurisdiction conferred on justices of the peace of actions upon such judgments, is general; and it is not limited, as it is in most of the other actions of which they have jurisdiction, to cases in which the amount claimed does not exceed one hundred dollars. The justice, therefore, had jurisdiction of this action upon the judgment of Martin Marcley, Esquire, and to give the plaintiff judgment for the amount due thereon, although it exceeded one hundred dollars.

Before the code was enacted, a justice of the peace could not render a judgment for a sum exceeding one hundred dollars, exclusive of costs, in an action upon a judgment of his own court. (2 *R. S.* 225, § 2, *subd.* 1. *Laws of* 1840, *p.* 265.) Had the jurisdiction of the justice to render judgment in all cases been limited to one hundred dollars, the defendant would have been under no obligation to appear in the action; because the summons required him "to answer in a civil action, the complaint of Robert Humphrey, to his damage of one hundred and seventy-five dollars." (*Yager* v. *Hannah*, 6 *Hill*, 631.) The defendant should however have appeared in the action; as justices of the peace have jurisdiction of some actions, wherein judgments are claimed for sums exceeding one hundred dollars. (*Code*, § 53, *subd.* 6, 7.)

It was not necessary to the validity of the judgment in this action, that the summons should have informed the defendant that the plaintiff's complaint would be upon the judgment of a justice of the peace. (*Cornell* v. *Bennett*, 11 *Barb* 657. *Smith* v. *Joyce*, 12 *id.* 21. *Delancy* v. *Nagle*, 16 *id.* 96.)

The omission of Martin Marcley, Esquire, to certify in his docket, that the amounts appearing by such book to be due on the judgments therein, had not been paid to his knowledge; or to deposit such docket with the clerk of the town of Seward, when he removed from that town, did not affect the validity of the judgments in the docket, or vary the effect of the same as evidence; as the statutes that required him to do so are merely directory. (2 *R. S.* 270, §§ 252, 253, 254.) Marcley could have been punished for such neglect of duty; but the parties to judgments entered in his docket neither lost nor gained by reason of his delinquency.

The fact that the judgment upon which this action is founded was recovered more than six years prior to the commencement of the action, was no cause for reversing the judgment given upon it; for "the objection that the action was not commenced within the time limited can only be taken by answer." (*Code*, § 74. *Lefferts* v. *Hollister*, 10 *How. Pr. Rep.* 383. *Per Gray, J., Swift* v. *Drake, MS. case, General Term, 6th district.*) Although the statute applicable to courts held by justices of the peace declares, "In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case," (*Code*, § 64, *subd.* 8,) the plaintiff need not disprove any defense that must be specially pleaded, to be available to the defendant. All that the plaintiff is obliged to prove, in such a case, is enough to entitle him to recover, if the allegations in his complaint were denied generally, by an answer. It is unnecessary to determine when an action upon a justice's judgment is barred by sections 90 and 91 of the code; or the effect of such sections upon justices' judgments rendered prior to the passage of the code, if such sections extend the time for bringing actions upon such judgments to twenty years.

The judgment of Justice Marcley was not void. His docket furnished sufficient evidence that the summons was returned to him, with the return of a constable thereon endorsed, that he had personally served the same upon the defendant, more than six days prior to the return day therein specified. The day of its service was also stated. Marcley thus acquired ju-

risdiction of the defendant; and having jurisdiction of the action before him, his judgment, if voidable for irregularities thereafter committed, was not void; and it will therefore uphold the judgment given upon it in this action. (*Hard* v. *Shipman*, 6 *Barb.* 621. 4 *id.* 541 *Bromley* v. *Smith*, 2 *Hill*, 517.) Giving the docket that fair and reasonable construction which the decisions of this court seem to require, it showed a valid judgment against the defendant. (*See* 2 *Hill*, 517; 1 *Denio*, 432; 7 *Wend.* 388; 2 *Kern.* 439.)

Again, the statute prescribing what entries justices of the peace shall make in their dockets, (2 *R. S.* 268, § 243,) is directory; and a literal compliance therewith is not necessary, when the entries show the justice had jurisdiction of the parties and the subject matter of the action; and also show the kind and amount of the judgment given, and that it was rendered at a proper time. (2 *Hill*, 329. 14 *Barb.* 291.)

Having examined and considered all the points made by the defendant's counsel, and found no error in the proceedings before the justice, or in his judgment, the judgment of the county court should be reversed, and that of the justice affirmed, with costs.

GRAY, J. This action was brought upon a justice's judgment rendered in July, 1842, for a sum less than $100, which, with interest upon it when this suit was commenced, exceeded that sum. The only question in the case, involved in any doubt is, whether the code has extended the jurisdiction of justices of the peace in such actions where the amount claimed exceeds $100. It must be conceded that a judgment rendered by a justice of the peace, though it is in the nature of a debt of record, and conclusive between the parties, is, nevertheless, regarded as a contract, and so treated by the courts of this state. (*Mather* v. *Bush*, 16 *John.* 233. *Jackson* v. *Fuller*, 6 *Cowen*, 509, 590. *Mitchell* v. *Hawley*, 4 *Denio*, 414, 416. *McGuire* v. *Gallagher*, 2 *Sandf.* 402, 403.) And if there was no other provision on the subject of the jurisdiction of justices of the peace in actions arising upon contract, than is to be

found in subdivision 1, of § 53 of the code, it would be expressly limited to cases where the sum claimed does not exceed $100; but in the same section, subd. 6, jurisdiction in an action upon a surety bond is unlimited, and in an action brought upon a judgment rendered in a court of a justice of the peace, jurisdiction is, by subd. 7, of the same section, given in all cases not prohibited by § 71. That only prohibits the right of action within five years, except in specified cases. It is impossible to carry out subd. 7, conferring jurisdiction "*in all cases*" except those specified, unless jurisdiction is allowed to any amount for which judgment has been rendered, with the interest that has accrued upon it. The increase of jurisdiction is but the amount of interest that has accumulated upon a justice's judgment rightfully rendered. No intricate question could arise, more than upon a judgment for a less amount. There is nothing alarming in the exercise of such a jurisdiction, that calls upon a court for a subtle construction of the statute, to prevent its exercise. The fair construction of the three subdivisions of § 53 (1, 6 and 7,) when considered together, is that civil jurisdiction is conferred upon justices of the peace in actions arising upon contract, for the recovery of money only, if the sum claimed do not exceed $100, except where the action is upon a surety bond, or on a judgment rendered in a court of a justice of the peace; and in these actions, the jurisdiction may be exercised in all cases, except when prohibited by § 71. It is no objection to the plaintiff's right to recover, that more than six years elapsed after the judgment was rendered, before this suit was brought upon it. The defendant, to have availed himself of this objection, should have appeared and pleaded the statute. This we held in the case of *Swift* v. *Drake*, several terms since. I am therefore of opinion that the judgment of the county court should be reversed, and that of the justice affirmed.

Mason, J. The objection raised to the validity of the judgment in this case, on the ground that the justice had not jurisdiction to render judgment for $175, is not well taken. The

action was upon a judgment rendered in a justice's court. Justices' courts had jurisdiction, under the code, in actions upon justices' judgments, without limit as to amount. Section 52 of the code repeals all statutes giving or limiting the jurisdiction of justices' courts. By section 53, justices' courts now have jurisdiction in the actions enumerated in subdivisions 1, 2, 3, 4, 5 and 9, to the amount of $100, and in subdivision 8, to the amount of $250, and in subdivisions 6 and 7, to any amount. It seems to me too clear to be questioned that by subdivision 7, of section 53 of the code, justices have now jurisdiction of all actions upon justices' judgments, without reference to amount. The summons in a justice's court need not state the nature of the action. (*Cornell* v. *Bennett*, 11 *Barb.* 657. *Smith* v. *Joyce*, 12 *id.* 21.) But if the nature of the action be stated, the plaintiff may complain for another cause of action. The docket of the justice, which was given in evidence, to prove the judgment rendered by Justice Marcley, although not very formal or full in its statements, yet contains enough to show that Marcley had jurisdiction of the parties and of the subject matter of the action; and I am of opinion that the docket sufficiently shows that a judgment was rendered in favor of the plaintiff and against the defendant, for $92 damages and $3.46 costs. The county court erred in reversing the judgment of the justice in this case on the ground that the statute of limitations was a bar to the action. We held in the case of *Swift* v. *Drake*, that the statute of limitations cannot avail the defendant, under the code, unless he pleads it, any more than under our former system. (*See MS. opinion of Gray, justice. Also Lefferts* v. *Hollister*, 10 *How. Pr. Rep.* 383.) The judgment of the county court should be reversed, and that of the justice affirmed.

Judgment of the county court reversed, and that of the justice affirmed, with costs.

[Broome General Term, January 13, 1857. *Gray, Mason* and *Balcom* Justices.]

PUMPELLY and others *vs.* TINKHAM.

When, upon the death of a sole or surviving executor, application is made to the surrogate, for letters of administration with the will annexed, of the assets of the first testator left unadministered, *prima facie* evidence of the fact that there are such assets, left unadministered, is sufficient.

The general allegation, in the petition for letters, that the executors named in the will died, "leaving certain property and assets" of their testator "still unadministered," followed by a statement of the value thereof, is sufficient to confer jurisdiction upon the surrogate to issue letters to the applicant, where the petition is duly verified.

It is no objection to the appointment of an administrator with the will annexed, that owing to the lapse of time since the deceased executors took out letters testamentary, and the operation of the statute of limitations, such appointment would confer only a barren office upon the person appointed.

Upon such an application, the surrogate has no right to determine the question whether the applicant, if appointed administrator, could recover any of the alleged unadministered assets of the deceased testator; or would have any legal or equitable cause of action against the representatives, or heirs, or next of kin of the deceased executors.

THE facts in this case sufficiently appear in the opinion of the court.

Thomas Farrington, for the appellants.

Davis & Walker, for the respondent.

By the Court, BALCOM, J. David Pixley died in the year 1807, leaving a last will and testament, in which James Pumpelly and John H. Avery were named as executors. The will was proved, before the surrogate of Broome county, in 1807; and it was recorded in the office of such surrogate in the same year, and Pumpelly and Avery took letters testamentary, as such executors, from the surrogate, in the same year. Pixley left a large estate, but his executors did not return an inventory of his personal property, and they never settled or accounted before the surrogate. Avery died in 1837, and Pumpelly died in 1845. The county judge of Broome county, acting as surrogate, made an order on the 22d day of February, 1856, in and by which he appointed the respondent administrator of the

goods, chattels and effects of David Pixley, deceased, with his will annexed; upon the respondent giving sufficient sureties and taking the proper oath, as such administrator. George J. Pumpelly and others have appealed from the order of the county judge, to this court.

No question is raised as to the competency or right of the respondent to letters of administration, with the will of David Pixley, deceased, annexed, if a case was made that authorized the county judge to grant such letters to any person. The statute applicable to cases like this, is in these words: "On the death of the sole or surviving executor of any last will, letters of administration with the will annexed, *of the assets of the first testator left unadministered*, shall be issued in the manner and with the authority hereinafter provided." (2 *R. S* 71, § 17.) The further provision referred to, is as follows: "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators with such will, shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will." (*Id.* 72, § 22.) The manner in which this section has been construed is quite immaterial in this case. (*See* 21 *Wend.* 430; 3 *Kernan*, 593.)

The appellant's counsel insists that the proof which was made before the county judge does not show that there are any assets of David Pixley, deceased, *left unadministered.* But I am of the opinion that sufficient proof was made upon the point, to uphold the decision of the county judge, that there are unadministered assets of the deceased testator. *Prima facie* evidence of the fact is all that is necessary in such a case. The general allegation in the petition for letters, that the executors named in the will of David Pixley died leaving certain property and assets of the said David Pixley, deceased, still unadministered," followed by a statement of the value thereof, was sufficient to confer jurisdiction upon the county judge, to issue letters to the respondent, as such petition was duly verified. This allegation occurs twice in the petition. Where it first occurs, it is followed by specifications of property, which the appellant's counsel contends

is not assets; but it is unnecessary to determine whether the property so specified, is or is not assets, as no specification of property, as assets, follows this allegation where it last occurs in the petition.

The appellant's counsel also contends, that the statutes of limitation, and the lapse of time since Pumpelly and Avery took letters testamentary as executors of the will of the deceased, show that the appointment of the respondent as administrator confers a barren office upon him, and is erroneous; and that the order of the county judge for his appointment should be reversed. This proposition is based on the assumption that all causes of action against the representatives, or heirs, or next of kin of the deceased executors, are barred by the lapse of time, and the statutes applicable to any actions or proceedings that can be instituted against them. A short and sufficient answer to this proposition is that the county judge had no right to determine the question, on the case before him, whether the respondent, as administrator with the will annexed, could recover any of the alleged unadministered assets of the deceased testator; or would have any legal or equitable cause of action against the representatives, or heirs, or next of kin of the deceased executors. This question was not legitimately before the county judge. It can only be raised in subsequent proceedings before him, or in another forum.

The order of the county judge should be affirmed, with costs to be paid by the appellants.

Mason, J., concurred, except that he was of the opinion the order of the county judge should be affirmed without costs to either party.

Gray, J., concurred with him on the question of costs, but did not vote on the other questions in the case.

Order of the county judge affirmed without costs to either party.

[Broome General Term, January 13, 1857. *Gray*, *Mason* and *Balcom* Justices.]

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WHEELER *vs.* BRANT.

Where a dog, which has the vicious habit of attacking and biting other dogs without being incited to do so, is suffered to go at large, and he attacks and kills the dog of a person lawfully coming upon the premises where he is, his owner is liable in damages for the value of the dog so killed, where it is shown that such owner had knowledge of the viciousness of his dog.

A dog which is accustomed to attack and bite other dogs, without being incited to do so, is a vicious animal; whether it has been trained to such habits or not.

Vicious dogs are a nuisance; and their owners must either kill them, or confine them, as soon as they have notice of their dangerous habits; or answer in damages for injuries inflicted by them.

THE facts in this case are sufficiently set forth in the opinion of the court.

H. R. Mygatt, for the plaintiff.

James W. Glover, for the defendant.

By the Court, BALCOM, J. This action originated in a court held by a justice of the peace, where the plaintiff recovered a judgment for $10 damages and $5 costs. The complaint states that the defendant, on or about the 2d day of October, 1854, wrongfully and injuriously kept a certain dog, well knowing that such dog was accustomed to attack and bite other dogs, and that such dog, whilst the defendant kept him, to wit, on the day and year aforesaid, did attack and bite, wound and injure the plaintiff's dog, in such a manner and to such an extent, that the plaintiff's dog died of the wounds and injuries so received. Also, that the defendant, whilst he kept his dog as aforesaid, to wit, on the day and year aforesaid, wrongfully, carelessly and improperly suffered such dog to go at large and unconfined, without being properly secured, and without taking due care or precaution to secure the same, in that behalf; and which said dog did attack, bite and wound and injure the plaintiff's dog; in consequence of which the plaintiff's dog died; to the damage of the plaintiff of $100. The defendant answered by denying each and every allegation in the complaint.

The evidence shows that the plaintiff's dog was a small one, and a pet or sporting animal, and that it followed him to the defendant's house one afternoon or evening, where it was attacked and bitten so badly by the defendant's dog that it died. The defendant's dog was much larger and stronger than the plaintiff's, and it had previously attacked and bitten other dogs without being told to do so, to the knowledge of the defendant. It was not tied or secured in any manner, to prevent its doing mischief. The plaintiff went to the defendant's house to see him, at the time his dog was bitten; but it does not appear what business the plaintiff had there with the defendant.

The issue was tried by a jury. If the evidence does not conclusively establish the foregoing facts, the jury was warranted in finding such facts from the evidence. The Chenango county court reversed the judgment of the justice, upon the ground that there was no evidence "showing the defendant's dog of vicious habits." The county judge clearly erred in so holding. The defendant's dog had previously attacked a shepherd dog and got it down, and the defendant had to choke his dog to get it off. One witness said he regarded the defendant's dog "as rather savage." Another witness stated that the defendant's dog had "pitched on to his dog" in the defendant's presence. A third witness testified that the defendant's dog had "pitched on to his dog" within a year before the plaintiff's dog was bitten, and that the defendant "knew it, and helped get his dog off as quick as he could." A fourth witness said he saw the defendant's dog "pitch on to his dog, when the defendant called him out and whipped him." This was the winter previous to the attack upon the plaintiff's dog.

This evidence was sufficient to authorize the jury to find that the defendant knew his dog had the vicious habit of attacking and biting other dogs, without being incited to do so, before it bit the plaintiff's dog. (*Loomis* v. *Terry*, 17 *Wend.* 500. *Buckley* v. *Leonard*, 4 *Denio*, 500. *Jones* v. *Perry*, 2 *Esp R.* 482.) There can be no doubt but that a dog which is accustomed to attack and bite other dogs, without being incited to do so,

is a vicious animal, whether it has been "trained to such habits" or not.

The defendant's counsel contends that the plaintiff was guilty of such imprudence, in allowing his dog to follow him to the defendant's house, that he was not entitled to recover. And the case of *Brock* v. *Copeland*, (1 *Esp. R.* 203,) is relied upon, as well as others, to sustain this position. This position is untenable. It is not claimed that the plaintiff went to the defendant's house for any unlawful or improper purpose, or at an improper time; and the plaintiff did not, by simply going there, forfeit his harmless dog, because he permitted it to follow him. The defendant had no right to kill the plaintiff's dog, because it came to his house, so long as it did no mischief, even though the plaintiff committed a technical trespass by there walking upon the defendant's premises: nor had the defendant any right to cause the death of the plaintiff's dog, by the attack of an *unrestrained* vicious animal, although it was upon his own premises. The defendant's dog was a nuisance: and so are all vicious dogs, and their owners must either kill them or confine them, as soon as they have notice of their dangerous habits, or answer in damages for their injuries.

The evidence was sufficient, upon the several points in issue, to sustain the verdict of the jury. The judgment of the county court was therefore erroneous, and it should be reversed, and that of the justice affirmed, with costs.

Gray, J., took no part in the decision.

Mason, J., delivered an opinion, in which he came to the conclusion that the judgment of the county court should be reversed and that of the justice affirmed, with costs.

Decision accordingly.

[Broome General Term, January 13, 1857. *Mason*, *Gray* and *Balcom*, Justices.]

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32 233
5L 210
46a 136

WYATT and others *vs.* BENSON and others.

The supreme court having, since the constitution of 1846 was adopted, succeeded to all the powers and authority formerly vested in the chancellor, an application for leave to sell the real estate of a religious corporation must now be made to the supreme court. (*See note a.*)

Such an application can only be made by the *corporation;* and the court has no power to grant an order of sale, except upon the petition of the corporation.

Even the legally elected trustees of a religious society have no right or power to institute or carry on proceedings to sell the real estate of the society, without the consent of a majority of the corporation.

The corporation consists of every member of the congregation having the privilege of voting; and it was the intention of the legislature to place the control of the temporal affairs of religious societies in the hands of the majority of the corporators.

Where an order of the court, giving its consent to a sale of a church edifice, has been made, on the petition of a majority of the board of trustees of the society, but such petition was not authorized or sanctioned by a majority of the corporators, the order, if still *in fieri*, and not executed, no rights having been acquired under it, is under the control of the court; and it is competent for the court to revoke its consent to the sale.

And it is the *duty* of the court to withdraw its consent, when it is apparent that the sale of the property would be in opposition to the views of a large majority of the corporators.

A religious corporation, not having the power to sell its real estate without the consent of the supreme court, cannot submit the question of sale to any other tribunal; and if an arbitrator is chosen, and he decides that the property shall be sold, his award is not binding upon any one, and gives no authority to make the sale.

The making of such an award, and its confirmation by an order of the court, will present no obstacle to the granting of relief, by injunction to stay the sale, where it is shown that a majority of the corporators are opposed to the sale.

Neither will corporators be bound by the submission to an arbitrator, of the question who are the legally elected trustees of the corporation.

A submission and award in reference to that question cannot legally determine who are the duly and lawfully elected trustees, and will not prevent a portion of the corporators from calling in question the right of those claiming to be trustees, to act as such.

THE complaint in this cause was filed by 27 plaintiffs, on their own behalf and that of other members of the congregation and society of the First Methodist Episcopal Church in the city of New York, against the defendants, who claim to be the trustees of the said church. The object of the action was

to restrain the trustees from taking any further proceedings for a sale of the church in John street, belonging to said society. The complaint set forth that the said society were the owners of a valuable piece of ground in John street, upon which it erected a church, and which has been long used by said society as a place of religious worship. The complaint set out the names of 74 persons including the plaintiffs, who were the only members and corporators of the said society. It also set forth the proceedings instituted in this court, by the said trustees, to obtain its consent to a sale of the said real estate of the society, and the proceedings of those opposed to such sale. That on the 15th of June, 1856, 19 of the members of said society, including 8 of those who claimed to be trustees thereof, removed from said church in John street and organized a new church with the same name, in the Fourth avenue, near Madison square. That at a meeting of the trustees of said society held on the 12th of February, 1855, it was resolved that steps be taken, to remove said church and society up town, and on the 9th of April, 1855, the trustees of said society resolved that *in their judgment*, it was expedient and proper to make sale of the church property in John street as speedily as possible and to erect new church buildings in or near Madison square, and for that purpose an application was directed to be made to this court, for its consent to a sale of the said John street property. These proceedings of the board were supported by six trustees and opposed by three. That at that time only 16 members of said society were in favor of said sale and that 60 were opposed to it. That one of said trustees caused a paper to be prepared, to be presented to this court, for a sale of said property, and which was signed by 25 persons who claimed to be members of said society. That on the 2d day of April, 1855, a meeting of the members and corporators of said church and society was held, who passed resolutions in opposition to said sale. That on the 10th of May, 1855, on the application of said trustees, an order was made by this court consenting to a sale of the said church property. That soon thereafter a suit was instituted in this court, by James T. Barnes and several other members of said

society (none of the present plaintiffs being parties thereto) to restrain the sale of the said church and property. That on the 17th of September, 1855, a stipulation was entered into between the parties to these suits, to refer to the arbitrament of Bishop Simpson, the question of the sale and removal of the said church, and also the question of who were the legally elected trustees of the said church, and it was agreed that his award should be binding and final upon all the parties thereto, and upon all matters in controversy. It was agreed by the parties to such stipulation that Bishop Simpson's award should be a bar to all actions, litigations and proceedings of every kind and character, in that or any other action or complaint whatever, concerning the sale or removal of said church. Bishop Simpson did make his award on the 14th of December, 1855, but the same not being satisfactory to the parties, an order was made by this court in the said matter, resubmitting the whole subject to Bishop Simpson. That the parties opposed to the sale of said church, on the 9th of April, 1856, revoked their consent to said arbitration, and Bishop Simpson proceeded and made a new award. In this new award it was declared that the order of this court assenting to the sale of said church was a valid order, and should be carried into effect. That certain persons therein named were duly and legally elected the trustees of the said corporation. That the injunction granted restraining the sale of said church should be vacated. Thereupon an order was made in this court, on the 28th of April, 1856, confirming said award, and from that order an appeal was taken to the general term of this court, which is now pending. That in June, 1856, an action was commenced by the defendants, claiming to be the trustees of the said church, to obtain the possession thereof, and an injunction was thereupon issued, restraining the persons therein named as defendants from resisting the occupation of the premises by the plaintiffs. That several other suits have been instituted by various parties, in reference to said church, and the proceedings of the persons claiming to be trustees, and in favor of the sale and removal of said church, to obtain possession thereof. The plaintiffs further stated that they, and a large majority of the

members and corporators of said society, were opposed to said sale and removal; that the trustees elected at said church, which they alleged was the only legal place of election, were opposed to said sale and removal, and that none of the present plaintiffs were parties to any of said actions or proceedings, or to said submissions made to Bishop Simpson; and that they are not bound thereby. That this action was prosecuted in behalf of all the members and corporators of said church and society opposed to said sale and removal. They prayed that the action of this court consenting to said sale, may be annuled and revoked, and that the persons claiming to act as such trustees of said society, and in favor of said sale and removal, be restrained from taking any further proceedings for that purpose. The complaint also prayed that the persons who had been elected trustees by the opponents of said sale and removal, might be declared to be the duly elected and legal trustees of said society and corporation, and that the others claiming to be such trustees should deliver over and transfer to them all the corporate funds and securities now in their hands.

To this complaint the defendants put in an answer denying many of the allegations of the complaint. In support of them a large number of affidavits were read, from which it was clearly apparent, that a large majority of the corporators and members of said church and congregation are and have been since the first institution of the proceedings for that purpose, opposed to the sale and removal of the said church. The answer of the defendants was sworn to by them, and no affidavits were presented by or on behalf of any of the other persons claiming to be corporators or members of said church or society.

P. Y. Cutler and *L. S. Chatfield*, for the motion.

E. L. Fancher and *J. W. Edmonds*, in opposition.

DAVIES, J. The First Methodist Episcopal Church of the city of New York is a religious corporation, incorporated under the general act of the legislature of this state providing for the incorporation of religious societies. It would appear from the

12th section of the act of March 27, 1801, that it had been incorporated previous to that date, as that section authorizes the said corporation to continue to elect nine trustees of the said corporation, in the same manner as if that number of trustees had been originally named in the certificate of incorporation. (*Vol.* 1, *K. & R. p.* 343.) Section 3, of the act authorizing the incorporation of religious societies, provides that the male persons of full age belonging to any church, congregation, or religious society, may meet at the place where they statedly attend for divine worship, and elect not more than nine trustees, *to take charge of the estate and property belonging thereto*, and to transact all affairs relative to the temporalities thereof. After the first election of trustees no person is entitled to vote at subsequent elections, unless he shall have been a stated attendant on divine worship in the said church, congregation or society, at least one year before such election, and shall have contributed to the support of the said church, society or congregation, according to the usages and customs thereof. The powers of the trustees are particularly defined in section 4 of this act, and the only property of the society which they are authorized to dispose of is "All the moneys belonging thereto." Incorporated religious societies are aggregate corporations, and whatever property they acquire, whether it be real or personal, is vested in interest in the body corporate, and while the officers have it under their control or dominion, whatever possession they have is the possession of the artificial person, whose agents they are: they have no other possession than the directors of a bank have of a banking house. They are but the officers and agents of a corporation, who is the proprietor. (*Per Denio, J., in The People* v. *Fulton*, 1 *Kern.* 94.) The corporation is the congregation in whom the right of election of trustees exists. This is apparent from the 14th section of the act, already referred to, which provides "that the *corporation* of the Methodist Episcopal Church in the city of New York shall be and hereby are authorized to continue to elect nine trustees of the said corporation." Section nine of said act is in harmony with this view. It provides that "whenever any religious corporation within this state

other than the chartered corporations, shall deem it necessary and for the interest of such religious corporation to reduce their number of trustees, it shall and may be lawful for any such religious corporation to reduce their number of trustees at any annual meeting." The trustees have no annual meeting, the corporation have, and it is composed of the male members of full age, who are stated attendants on divine worship in said church, for the time required by the act and have contributed to its support. These provisions admit of but one construction. But if any doubt has heretofore existed on this subject, it is now removed by the decision of the court of appeals in the case of *Robertson* v. *Bullions*, (1 *Kernan*, 243.) That court holds that the society and not the trustees constitute the body corporate, that the societies are themselves incorporated, that their members are the corporators, and that the trustees are the managing officers of the corporation. That "the provision giving to every member of the corporation the privilege of voting, and the entire omission of any requirement in respect to the religious views or opinions of the persons to be elected as trustees, afford unmistakeable evidence that no very rigid adherence to any particular creed or doctrine was contemplated, so far as concerned the management of the temporal affairs of the society, but that it was intended to leave all this to be regulated and controlled by the members of the corporation through the exercise of their legitimate corporate powers. That the trustees can execute no trust except such as is acceptable to the majority of the congregation." That "the whole act shows that it was the intention of the legislature to place the control of the temporal affairs of these societies, in the hands of the majority of the corporators, independent of priest, or bishop, presbytery, synod, or other ecclesiastical judicatory."

These views, I think, are also sustained by section 11 of the said act, to which particular reference will be made in another connection. Chancellor Kent holds, (2 *Kent's Com.* 314,) that the powers given to trustees of religious societies incorporated under this act, are limited to purchase and hold real estate and then to demise, lease and improve the same *for the use of the*

congregation. It was an incident, at common law, to every corporation, to have a capacity to purchase and alienate lands and chattels unless they were specially restrained by their charter or by statute. Independent of positive laws, all corporations have the absolute *jus disponendi* of lands and chattels, neither limited as to objects, nor circumscribed as to quantity. And this common law right as to disposition continued in England until it was taken away by several restraining statutes. These statutes were passed in the reign of Elizabeth and one in the first year of her successor, restraining alienations of church property by religious corporations, and restricting the power of leasing the same for a longer period than 21 years or three lives, or below the accustomed rents. (*See* 1 *Evans' Stat.* 381 *to* 390.) These disabling acts have not been re-enacted in this state, but the better opinion upon the construction of the statute for the incorporation of religious societies is that no religious corporation can sell in fee any real estate without the chancellor's order. (2 *Kent's Com.* 314.) Chancellor Walworth holds, in *De Ruyter* v. *The Trustees of St. Peter's Church*, (3 *Barb. Ch.* 122,) that "these statutes forming part of the law of England at the time of the settlement of this state by colonists from England, under the charter of the Duke of York, were probably brought hither by those emigrants and became a part of the laws of the colony, although they were not re-enacted here. For it is a natural presumption, and therefore adopted as a rule of law, that on the settlement of a new territory by a colony from another country, and when the colonists continue subject to the government of the mother country, they carry with them the general laws of that country, so far as those laws are applicable to the colonists in their new situation."

The chancellor thereupon holds that there was a common law existing in this state restraining religious corporations from alienating church property, and that the same could not be done until the legislature passed the act of March, 1806, authorizing the chancellor, upon the petition of the corporation, to make an order for such sale. (*See also the case of Bogardus* v. *Trinity Church*, 4 *Paige*, 198.)

Such being the state of the law, the act of March, 1806, was passed, making it lawful for the chancellor of this state, upon the application of any religious *corporation*, in case he shall deem it proper, to make an order for the sale of any real estate belonging to such corporation, and this is the language of section 11 of the act relative to the incorporation of religious societies, before referred to. (1 *R. S.* 298, § 11.) This court having, since the constitution of 1846, succeeded to all the powers and authority vested in the chancellor, the application is now necessarily to be made to this court.(*a*) But it cannot escape observation that the application can only be made *by the corporation*, and that this court has no power to make such order, except on such an application. We have seen that no such authority is conferred upon the trustees of any religious corporation. That the application must be made *by the corporation* and that *the corporation* consists of "every member of the congregation having the privilege of voting," and "that it was the intention of the legislature to place the control of the temporal affairs of these societies in the hands of the majority of the corporators." The order of this court, giving its consent to a sale of said church, was made on the petition of a majority of the then board of trustees of said society. It was not then alleged, nor is it now asserted in the defendants' answer, that such application was authorized by a majority of the corporators thereof, and the answer does not deny that the same was presented in pursuance of a resolution adopted by said board of trustees at a meeting held on the 9th of April, 1855, which declared "that in the judgment of this board it is expedient and proper to make a sale of the church property in John street as speedily as possible and to erect new church buildings in or near Madison square."

If the previous conclusions arrived at are sound, the judgment or views of the board of trustees in reference to a sale of the church property were of no moment except so far as they were the expression of the opinion of that number of members of the society. It was the judgment and opinion of a majority of the

(*a*) It may also be made to the county court. (*Code*, § 33.)

members of the corporation only which carried weight and gave force and effect to the proceeding. Those who spoke the ascertained opinions of such majority, were only authorized to make such application for them, and then only the corporation spoke and acted. It might perhaps have been assumed that the trustees did represent the views of the corporation, in making the application, and that there was apparent authority for granting the consent of this court. The order is yet *in fieri*, not having been executed, and no rights having been acquired under it, it is still under the control of the court, and it is therefore competent for this court to revoke its consent to such sale. Nay, I think it is its bounden duty to withdraw its consent to the sale, it now being most apparent that such a measure is in opposition to the views of a large majority of the corporators. It is for the corporators to say what shall be done with their own property, and not for the trustees, who are creatures of their will, and who have no existence but by their suffrages. Giving to the trustees consent to sell the property of the corporators while this large majority are opposed to the measure, is giving to the agent control over the principal, making the servant greater than his master, and permitting the agent to sell the property of his principal, in spite of his solemn protest. The views and wishes of these corporators being now made known to this court, I deem it the duty of the court to withhold its assent to a sale of this church property.

This court has no power to direct or require the corporation to sell its property against its will. (*Matter of the Reformed Dutch Church in Saugerties*, 16 *Barb.* 241.) The language of Harris, justice, in that case, where the majority were in favor of the sale, which was therefore ordered and consented to by the court, is pertinent to the case now under consideration: "The remonstrants, though numerous and comprising some of the most respectable men in the church and society, are yet in *a minority*. It is the right of the majority to control in all civil affairs, and not less in the management of the temporalities of a religious society than in any other. This is a cardinal principle of our free institutions. It pervades the whole structure of

society. Where men differ in opinion the will of the majority must prevail. The rule is safe and equitable. Sometimes, though not often, the application of the rule results in individual hardship. Sometimes too, though very rarely, it is necessary to protect the rights of a minority, against the arbitrary acts of a majority. But generally, when individuals unite their interests to accomplish a common end, they should expect and be willing that a majority of the associates should govern in all matters of common interest. They may be supposed to enter the society with the knowledge that they are to be governed by this principle."

But the defendants plead in bar to the relief asked for by the complaint in this cause, the submission and award made by Bishop Simpson, which they insist is a final disposition of the question as to the sale of the church and who are the legally elected trustees of the corporation. The present plaintiffs were not parties to that submission, and consequently are not bound by the award, however legal and binding it may be on the parties to it. (*Delafield* v. *Colden*, 1 *Paige*, 139.) It was not competent, in my judgment, to submit the question, as to whether or not the church should be sold, to any tribunal, other than that pointed out by law. We have seen that the corporation itself has no power to sell its real estate, without the consent of this court. It could not therefore submit that question, to any other tribunal, and no arbitrator can say that such real estate shall or shall not be sold. That is a matter resting solely in the discretion of this court, and cannot be lawfully delegated to any one else. The award that the property should be sold, binds no one, and gives no authority to make the sale. So an award that it should not be sold, cannot control the discretion or power of this court to consent to a sale, on a proper application of the corporation for that purpose. I have no doubt, therefore, that the award of Bishop Simpson that the church should be sold, and its confirmation by an order of this court, present no obstacle to the relief asked for by the plaintiffs.

So in like manner the plaintiffs are not bound by the submission of the question as to who were the legally elected trustees

of the corporation. A submission and award in reference to that question could not legally determine who are the duly and lawfully elected trustees of this corporation. A proceeding on the part of the people is the only conclusive form known to the law definitely to settle that question, and an award like that interposed in this case presents, in my judgment, no obstacle to the plaintiffs calling in question the right of the defendants to act as the trustees of the First Methodist Episcopal Church. Even though the defendants be the legally elected trustees of the society, they have not, in my opinion, any right or power to institute or carry on proceedings to sell the real estate of the society, without the consent of a majority of the corporators.

I am therefore of the opinion that the consent of this court to the sale of said church, given on the application of a portion of the trustees, and not sanctioned by a majority of the corporators, should be withdrawn and revoked, and that an injunction should issue to restrain the defendants from taking any further proceedings in relation to a sale of the same.

I cannot close my investigation of this case, without the expression of my deep regret at witnessing the painful and bitter state of feeling engendered in this society in reference to the removal of a portion to the upper part of the city, and their desire that the church of their fathers should be sold and no longer be used for the holy purposes for which it has been so long consecrated. This movement, as has been seen, is most strenuously opposed by the large majority of the corporators who yet remain, and still linger around the old house of worship. It is not surprising that they cling to its hallowed walls with affection and earnestness, and resist every effort to drive them from this cherished spot. I shall indulge the hope that some amicable mode for a fair and just division of this property, among those who have by inclination or necessity been compelled to remove to another part of the city, and those who remain, may yet be found and adopted. It certainly cannot be difficult to devise a plan which will insure justice to all, and permit this venerable edifice yet to remain "for the service of the Almighty God, after the manner of the people called Methodists."

I cannot better express my own views than to use the language of Judge Harris in the case quoted above. He says, "those who prevail in this controversy should not forget that the minority as well as themselves have their rights. These rights should be tenderly regarded, and the more so because they *are* the rights of the minority. It is quite evident, I think, that the parties are not likely, successfully, to maintain two distinct organizations. Under these circumstances, sound policy, as well as the more exalted principles by which all the parties profess to be actuated, require that the most enlarged forbearance should be habitually exercised, and the most liberal concessions made towards those who have hitherto opposed the action of the majority."

[New York Special Term, January 21, 1857. *Davies*, Justice.]

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36h 496
77a 50

THE PEOPLE, *ex rel.* Downing, *vs.* A. V. STOUT, treasurer, &c.

The board of supervisors, in each county, have conferred upon them, by law, most important powers, and in reference to all county charges they have the authority to direct the levying, collecting and raising of the same; and it is their duty to exercise that authority.

When a board of supervisors are required, by law, to audit and allow the accounts of a class of public officers, they have no discretion to exercise, but must allow the salary as fixed by law.

So, after the compensation of the city inspector of the city of New York, for keeping a record of births, deaths and marriages, has been fixed by the board of supervisors, under the authority conferred upon them by the statute, it becomes as binding and conclusive on the board, in reference to the auditing and allowance thereof, as though it had been fixed by the legislature itself. And the board has no discretion on the subject, but must audit and allow the accounts of the inspector, on the basis of the compensation thus established.

And it being the duty of the supervisors to direct the raising of such sums as may be necessary to defray and discharge all accounts chargeable against the county, and it having full and ample power to do so; and having, moreover, levied and collected the sum of $70,000 for *county contingencies*, under an act of the legislature, which prohibited the money from being expended or applied for any other purpose; *Held*, that a fund was thus provided for the payment

of the city inspector's accounts, after they had been audited and allowed by the board of supervisors, and that a *mandamus* would lie to compel the treasurer of the city to pay such accounts.

Held also, that it was no excuse for not paying such accounts, that the fund had been exhausted in paying claims against the corporation, or for city contingencies.

MOTION for a peremptory mandamus to the defendant, as treasurer of the county of New York, directing him to pay to the relator the amount of an account which had been audited and allowed by the board of supervisors and ordered to be paid by the defendant as county treasurer. An alternative mandamus had previously been issued, to which the defendant made a return.

J. W. Edmonds, for the relator.

M. V. B. Wilcoxson, for the defendant.

DAVIES, J. In 1853 the legislature of this state enacted a law providing for the keeping a record by the city inspector of the city of New York, of each birth, marriage and death happening in said city and reported to him. (*Laws of* 1853, *ch.* 75.) By section 4 of this act it was provided that said city inspector should be entitled to receive for his services, under that act, such fees for recording each birth, marriage or death, as the board of supervisors of the city of New York might establish, the fees for recording of births being payable by the board of supervisors, and for marriages by the person reporting the same, and the fee for recording each birth or marriage was not to exceed ten cents. In pursuance of the authority conferred by this act, the board of supervisors of the county of New York, (that being the body evidently intended by the act,) on the 3d of August, 1853, proceeded to fix the fees of the city inspector for recording births and marriages under the act, and fixed the same at ten cents each. (*See proceedings of the Board of Supervisors for* 1853, *pp.* 183-6.) The relator was city inspector for the years 1853, 1854 and 1855, and during

those years performed the duties enjoined upon him by virtue of this act. After the termination of his official term, and during the present year, he presented his account for such service to the board of supervisors of this county, who have audited and allowed the same, and directed the payment thereof by the defendant, the county treasurer of said county. His refusal is based on the ground that the only fund out of which the same can be paid is the sum of $70,000 authorized by the annual tax bill of 1856 to be raised for county contingencies, and that the whole of the said fund, except the sum of $450, had been paid out by him, upon what he alleged to be legal and proper warrants upon said fund, and that consequently he cannot pay the same. As evidence of such payments, and of the purposes and objects to which the same have been applied, the county treasurer has furnished the court with a statement of all drafts drawn upon that fund and paid by him, from which it appears that he has paid, from January 1, 1856, to December 9, 1856, out of said fund of $70,000, by warrants drawn upon it, the sum of $69,943.68, leaving a balance in his hands of the sum of $56.32, only.

The state of New York, for the purpose of government, is divided into counties, towns and cities. The boundaries of each are defined by the revised statutes, and the power, duties and liabilities of each are defined by the constitution and laws of the state, or the charters of the several cities. Part 1, ch. 2, tit. 1, of the revised statutes, contains the division of the state into 60 counties, and defines the boundaries of each. Among the counties enumerated is the county of New York, and its boundaries are specified. Title 5th of the same part and chapter contains the division of the several counties of this state into towns, (except the county of New York,) and defines the boundaries of each town. Title 6th of the same part and chapter contains an enumeration of the several cities of this state, and their division into wards, and defines the boundaries of each city, and of the several wards into which the same is divided. Section first of this title declares that the city of New York contains all that part of this state comprehended within the

bounds of the county of New York, and which is now divided into twenty-two wards.

We thus see that for the purpose of civil government, two separate and distinct organizations are established, embracing the same territory, and each possessing its appropriate functions. The county is organized for the purpose of state government, the city for the management of its private property and franchises, and with authority to make all needful laws, statutes, rules and regulations useful and necessary for the good rule and government of the corporation, and of all officers, citizens, inhabitants and residents of the said city, within the limits thereof. The powers conferred upon the city government are found in the several charters granted by the crown and confirmed by the people of this state, in their several conventions, and by various acts of the legislature which have been passed, amending these charters, with the assent of the corporation. The powers and duties of the board of supervisors are to be found in the revised statutes of this state, and of the several acts of the legislature, conferring specific powers upon them. Chapter 12th of part 1st of the revised statutes treats of the powers, duties and privileges of counties and of certain county officers. Section first, article first, title first, declares that each county in the state, as a body corporate, has capacity to sue and be sued in the manner prescribed by law; to make such contracts, and to purchase and hold such personal property as may be necessary to the exercise of its corporate or administrative powers. Section 2d declares that no county shall possess or exercise any corporate powers, except such as are enumerated in that chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers enumerated or given. By section 3d it is provided that all acts and proceedings by or against a county in its corporate capacity, shall be in the name of the supervisors of such county. By section 4th it is provided that the powers of a county, as a body politic, can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted. Title second of same chapter relates to the county officers, which are declared to be the board of supervisors, county treasurer, loan

officers, and commissioner of loans, clerk of the county, sheriff, coroners and surrogate. Article 1st of said title treats of the board of supervisors, and declares their powers and duties. Among the most important and pertinent to this investigation are, "to examine, settle and allow all accounts chargeable against such county, *and to direct the raising of such sums as may be necessary to defray the same.*" Section 2 of title 4, article 8 of same chapter directs that the money necessary to defray the county charges of each county shall be levied on the taxable property therein. "And in order to enable their respective county treasurers to pay such contingent expenses as may become payable from time to time, the boards of supervisors of the several counties shall, annually, cause such sum to be raised in advance, in their respective counties, as they shall deem necessary for that purpose." By reference to section 3 of title 4 of article 8 of the same chapter, it will be seen what are declared by law to be county charges. They are enumerated in the several subdivisions of this section, from 1 to 15 inclusive, and by sub. 16, "Every other sum directed by law to be raised for any county purpose under the direction of a board of supervisors." It is, therefore, a clear deduction from these provisions of the statute, that the board of supervisors have conferred upon them by law most important powers, and that in reference to all sums justly and legally chargeable to the county, or in other words, for all county charges, they have the authority of law to direct the levying, collecting and raising of the same, and they not only have the authority of law, but it is their duty so to do.

As early as the year 1807, (*Laws of* 1807, *ch.* 48,) the legislature passed an act on this subject, which has ever since been in force, and the substance of it forms section 48 of article first of title 1 of chapter 12, part 1 of the revised statutes. The preamble to this act recites that whereas the supervisors of the several counties of this state have on some occasions neglected to raise such sums of money as by law they were required to raise, whereby great evils have and may result from such neglect and refusal, and for remedy whereof it was enacted that when the supervisors of any county had or should be directed by

law to raise moneys for any purpose, and should refuse or neglect to raise the sum so required to be raised, every supervisor so neglecting or refusing should forfeit and pay the sum of $250. By the revised laws of 1813, chapter 49, section 10, this forfeiture is incurred if any supervisor shall neglect or refuse to perform any of the duties required or enjoined on him by law, and such is the provision of the revised statutes. By section 10 of title 4, of article 8, of chapter 12, part 1 of the revised statutes, it is declared that accounts for county charges of every description shall be presented to the board of supervisors of the county to be audited by them. We have thus seen, that by law the city inspector was to receive for recording births such sum as should be fixed by the board of supervisors of this county, not exceeding ten cents for each birth, the sum to be paid by the board of supervisors. That the board of supervisors fixed said fee at ten cents for each birth. That every sum directed by law to be raised for any county purpose, under the direction of the board of supervisors, is a county charge. That all accounts for county charges shall be presented to the board of supervisors of the county to be audited by them. That it is the duty of the board of supervisors to examine, settle and allow all accounts chargeable against the county, and to direct the raising of such sums as may be necessary to defray the same.

This court, as early as the year 1810, held that an act of the legislature, similar to that of 1853, was mandatory upon the board of supervisors, and that they were bound to execute it without delay, and that the supervisors who refused to raise the money for the purpose required by law, were liable to the penalty of $250 for such neglect and refusal. (*Caswell* v. *Allen*, 7 *John.* 63.) Yates, J., in delivering the opinion of the court, says in reference to the act of 20th of March, 1807, and which has been in force in this state ever since, that "this law was passed to prevent a growing evil. Many instances had occurred of supervisors, not only neglecting, but absolutely refusing to comply with acts of the legislature, by which they were directed to raise money for public purposes, and by such neglect impeded the progress of measures evidently beneficial to the community. Although

required for public convenience, yet owing to local prejudices and disputes, these measures could not be forwarded." In that case, an act of the legislature of April, 1807, had directed the supervisors of the county of Cayuga to raise the sum of $800, to be applied toward the erection of a fire-proof clerk's office in said county. Judge Yates further says, "This act is mandatory. No discretion appears to be given to the supervisors; they were obliged forthwith to raise and levy the tax as directed, and the supervisors, who, by their votes, prevented a compliance with the statute, have rendered themselves liable for the penalty mentioned in the law of 20th March, 1807."

The same principle has been decided by the court of errors in this state, in the case of *Merrit* v. *The People*, (3 *Denio*, 381.) This court held that when an act of the legislature declared certain salaries to be county charges, and directed the supervisors to audit and allow the same, every supervisor who neglected or refused to make such audit and allowance, subjected himself to the penalty of the statute. That when the board of supervisors of a county are required, by law, "to audit and allow" the accounts of a class of public officers, they have no discretion to exercise, but must allow the salary as fixed by law. The compensation to the city inspector was fixed by the board of supervisors, under the authority of law, and when so fixed became as binding and conclusive on the board of supervisors, in reference to the auditing and allowance thereof, as though it had been fixed by the legislature itself.

The supervisors had therefore no discretion in reference to the matter, but to audit and allow the accounts of the relator, on the basis of the compensation thus established. In *Supervisors of Onondaga Co.* v. *Briggs*, (2 *Denio*, 26,) Judge Bronson held that the audit and allowance of accounts against the county by the board of supervisors, who had the authority to make such audit and allowance, is a determination conclusive upon both parties, especially upon themselves. Section 49 of article 1 of title 2, chapter 12, part 1 of the revised statutes, declares that the mayor, recorder and aldermen of the city and county of New York shall be the supervisors of the city and county of New York, and all

the provisions of that article are made applicable to them, except where special provisions inconsistent therewith are or shall be made by law.

It is thus seen, I think, that the supervisors have discharged their whole duty, and nothing but their duty, in auditing and allowing this account. A further duty was imposed on them, and that was to direct the raising of such sums as might be necessary to defray or discharge all accounts, this as well as others, chargeable against the county. This they had full and am ple power to do, by the revised statutes quoted above, without any further legislative action, and this the board of supervisors in any county of this state annually do, by virtue of the authority thus conferred. An application was however made to the legislature for authority to levy and collect by tax such sums as it supposed would be necessary for these purposes, and the legislature at its last session authorized the board of supervisors to levy and collect by tax the sum of $70,000 for "county contingencies," and this sum has accordingly been levied and collected for this purpose. It was said on the argument that this sum has not been regarded as collected for county contingencies, or county charges, but has been used promiscuously for city contingencies, as well as county contingencies. It seems to me that its designation is clear, specific and unmistakable, and that it must be regarded as the plain declaration of the legislature that this sum was raised for the payment of county contingencies or county charges. The legislature well knew that there were county charges to be paid. They had so declared it on the statute book, and made it the duty of the supervisors to audit and allow them. And I see no other fund authorized to be raised by the annual tax-bill, which can at all be regarded as a fund for such a purpose. We must bear in mind that it is the only fund enumerated in the tax-bill which can be thus used, and that this law contains this important and significant declaration, that "no portion of the said respective sums hereinbefore named shall be expended or applied to any other purpose or object than the said object and purposes respectively for which the board of su

pervisors of said city and county of New York are hereby empowered to raise the same as aforesaid."

We thus see that county charges or county contingencies would accrue, and must be provided for, that the legislature authorized the raising of the sum of $70,000 for their discharge and payment, and declared that the moneys so authorized to be raised for the purpose, should in no event be expended or applied to any other purpose. We must adopt this conclusion or we are forced to the result that the legislature did not intend that this fund should be used for the purpose and object designated, but intended to leave the board of supervisors under the power conferred on them by the revised statutes to raise the necessary sums to defray all county charges in addition. I cannot think that this was the intent of the framers of the annual tax-bill, or of the legislature which passed it, but the act is to be construed to mean just what it says, that this sum of $70,000 is to be expended and applied to county contingencies, and to no other purpose or object whatever.

The charters of the city of New York authorize the appointment of an officer to be called the chamberlain or treasurer thereof. Such an officer has existed since the earliest organization of the city government. He is to receive, keep and disburse the funds of the corporation, under such rules and regulations as the common council may from time to time prescribe. By section 70, of article 2, title 2 of chapter 12, part 1 of the revised statutes, the chamberlain of the city and county of New York shall be considered the county treasurer thereof, and all the provisions of that article are to be construed to apply to him, except when special provisions, inconsistent therewith, are or shall be made by law. The treasurer is the officer of the county, and the county is liable for his default and misconduct. (*The People* v. *The County of New York*, 5 *Cowen*, 336.) By section 55 of this title it is provided that it shall be the duty of the county treasurer to receive all moneys belonging to the county from whatever source they shall be derived, and to pay and apply such moneys in the manner required by law.

It does not need any argument to show that moneys raised

for county contingencies belong to the county, and that the sums so raised are to be received by the county treasurer thereof, and paid and applied by him, in the manner required by law. That is, in reference to such moneys they can only be paid out to defray legal county charges, on accounts duly presented and verified according to law, and audited and allowed by the board of supervisors, and the reality of such audit attested by the signature of the chairman of the board, and the clerk thereof. In reference to moneys to be drawn from him as chamberlain or treasurer of the corporation, section 13 of the amended charter of 1853 provides that all accounts against the city shall be audited by the auditor of accounts, and that all moneys drawn from the city treasury shall be upon vouchers for the expenditure thereof *examined and allowed by the auditor and approved of by the comptroller.* No moneys can therefore be paid legally, or drawn from the city treasury, except on vouchers for the expenditure thereof, first examined and allowed by the auditor and then approved by the comptroller.

We thus see with what care and caution the legislature have thrown every guard around both the city and county treasury, and, in reference to the former, have placed a most emphatic veto upon the payment of any sum by the chamberlain, unless he receives the approval of the head of the finance department. Stringent regulations have also been provided by law in reference to payments by the county treasurer. Section 58 of the title 2 above referred to, declares that at the annual meeting of the board of supervisors, or at such other time as they shall direct, the county treasurer shall exhibit to them, all his books and accounts, and all vouchers relating to the same, to be audited and allowed. Section 43 of the same title, makes it the duty of the board of supervisors annually to publish in one or more public newspaper in such county, the names of every individual who shall have had any account audited and allowed by said board, and the amount of said claim as allowed, together with the amount claimed. We have seen how stringent are the penalties imposed on supervisors for the neglect of any duty imposed on them by law, and how uniformly the courts have

enforced them. These provisions for strict accountability and annual publicity of the claims audited and allowed, cannot fail to secure that rigid accountability and faithful application of the moneys raised by taxation which those who contribute it have the right on every principle to require.

We arrive now at our last inquiry, and that is, has the county treasurer any funds or moneys which he can apply to the payment of this account, and will a *mandamus* lie to compel its payment? That a *mandamus* will lie to compel a county treasurer to pay an account legally chargeable to the county, audited and allowed by the board of supervisors, was held by McCoun, J., in *Huff* v. *Knapp*, (1 *Seld.* 65.) and by Strong, J., in *The People* v. *Edmonds*, (15 *Barb.* 529.) If he has not the funds to pay the account, or has it not in his power to provide them, then he could not pay it, and the issuing of the *mandamus* would be an idle ceremony. It could not be complied with, and in such cases ought not to issue. (*The People* v. *Supervisors of Westchester County*, 12 *Barb.* 607. *The People* v. *Supervisors of Greene*, *Id.* 217.) If the defendant has or might have had the funds, he is equally bound to pay. (*Adsit* v. *Brady*, 4 *Hill*, 634.) The defendant alleges in his return that the whole of the moneys, being the sum of seventy thousand dollars, has been paid out by him, on warrants drawn upon that fund, and he claims that such payments were made by legal and proper warrants. He has furnished the court with a statement of the objects and purposes for which such payments were made, and he does not allege or pretend, that they were made to discharge accounts audited and allowed by the board of supervisors.

As I before intimated, I am of the opinion that this sum, which the legislature authorized to be levied and collected for "county contingencies," should in compliance with the statute have been paid into the county treasury, and that no payment, therefore, could legally be made, except in discharge of county charges, and which had been audited and allowed by the board of supervisors according to law. That the annual tax bill of 1856, expressly prohibits moneys raised for one purpose to be

applied to another, and that the use of the moneys raised by taxation for "county contingencies" to the payment and discharge of claims against the corporation, or for city contingencies, cannot be sustained. If the city have such charges and liablities to meet, such an item must be provided for in the annual tax bill, and because there are such liabilities which must be met, it is no reason, to my mind, why moneys which the legislatnre have authorized to be raised for one object, and which they have solemnly declared shall not be used for any other, shall be thus misapplied, and the obligations, to discharge which the fund was raised, remain unpaid.

I am unable to perceive any serious embarrassment which will result from an adherence to these requirements of the law. Whether there may be or not, I am not at liberty to disregard them, and being satisfied that the relator is entitled to the relief asked for, the motion for the peremptory mandamus is granted, with costs.

[New York Special Term, December 20, 1856. *Davies*, Justice.]

The People, *ex rel.* McSpedon & Baker, *vs.* Andrew V. Stout, county treasurer.

The Same, *ex rel.* McGill, *vs.* The Same.

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The necessary expenses incurred in keeping the property of a county in repair, and to preserve it from decay, and keep it in a condition for use, is a proper and legal county charge.

And it being the duty of the supervisors to provide rooms suitable and sufficient for the transaction of the business of the courts, they have the authority to keep such rooms in order. Hence expenses incurred for cleaning and painting, and other needful reparations of the court rooms, are a proper and legal county charge.

And the amount thus expended, having been audited and allowed by the board of supervisors, such audit and allowance is final and conclusive, as to the amount.

But, in the city and county of New York, the board of supervisors are restrained by statute from entering into any contract for work to be done or supplies

furnished, for the corporation, involving an expenditure of more than $250, except by contract founded on sealed bids, or on proposals, made in compliance with a public notice of ten days, which contracts shall be given to the lowest bidder with adequate security. Therefore, where work amounting to over $250, is done, without any public notice being given, for bids or sealed proposals, and without any bids or proposals having been received, or any contract being executed, and the accounts for such work are audited and allowed by the board of supervisors, their act in auditing and allowing them is a mere nullity, and it is the duty of the county treasurer not to pay the accounts; and a mandamus compelling him to pay them will not be granted.

The act of April 12, 1853, amending the charter of the city of New York, so far at least as it seeks to make applicable to the board of supervisors sections 12 and 15 of that act, was as passed, unconstitutional and void, for the reason that the power was delegated to the people of the city of New York to say whether or not it should be a law of the state.

But by the 4th section of the act of June 14, 1853, supplementary to the act of April 12, 1853, which section declares that the supplementary act, and the acts to which it is supplementary "shall commence and take effect as laws immediately," the legislature expressed its will that the act of April 12 should immediately become, and take effect as, a law. And the act of April 12 was re-enacted by the act of June 14; and the constitutional objection to the former, on the ground that it was dependent upon the will of the electors whether or not it should become a law, was therefore obviated.

AN alternative mandamus having been previously issued in each of the above cases, a motion was now made that a peremptory mandamus issue. In the first case it was alleged that on the 25th of January, 1855, a resolution was adopted by the board of supervisors of the city and county of New York directing the books of record in the register's office to be repaired under the direction of the committee of the board on county officers. That the relators were employed to do the said work, and performed the same, and that their bill therefor was duly presented to the board of supervisors, and audited and allowed at the sum of $2644.50. That the board of supervisors directed the defendant to pay the same. In the second case the relator alleged that he was employed by three of the supervisors, constituting the committee on civil courts of the board of supervisors, to paint the rooms occupied by the superior court; that he so painted them, and presented his bill to the board of supervisors for said work, amounting to the sum of $300, which

bill said board audited and allowed at that sum, and directed the defendant to pay the same.

J. W. Edmonds, for the relators.

M. V. B. Wilcoxson, for the defendant.

DAVIES, J. The register of the city and county of New York is a county officer, (§§ 1 *and* 2 *of Art.* 10, *Const.* 1846, *art.* 8, *title* 2 *of chap.* 12, *part* 1 *of R. S.*) It is made the duty of the register of the city and county of New York to provide the necessary books for recording deeds and mortgages, and books for general indices. A like duty is imposed on the clerks of the several counties. In the case of *Bright* v. *Supervisors of Chenango*, (18 *John.* 242,) this court held that "the books directed to be procured become permanent records, and are the property of the county. Although not exclusively, they are chiefly, for the benefit of the county. The clerk is bound to transmit them to his successor. The successor is not bound to pay the preceding clerk, and hence it follows that if no compensation is to be made, it becomes a game of chance between the different incumbents. The one who comes in after books are provided, and retires before new ones are necessary, will find it an office of profit, while the predecessor who purchased the books, and is shortly thereafter removed, may not have realized sufficient to equal his actual advancements. Such injustice has not received the sanction of law, but is guarded against by requiring the supervisors "to allow all accounts chargeable against the county." The authority was general, and was intended to embrace any case where the service rendered was specially for the benefit of the county, and for which other provision had not been made. The present case is clearly one of that description, so far as it respects the books purchased. In conformity with this principle, the books in the register's office have been purchased and paid for by the county, and consequently are the property of the county. It follows that the necessary expenses incurred in keeping the property

of the county in repair, and to preserve it from decay, and keep it in a condition for use, is a proper and legal county charge. The audit and allowance by the board of supervisors in cases where they are authorized to act is final and conclusive as to the amount to be paid. (*People* v. *Supervisors of Queens Co.* 1 *Hill*, 195. *Same* v. *Lawrence*, 6 *Hill*, 244.)

By section 28 of the code it is made the duty of the supervisors of the several counties of this state to provide the courts appointed to be held therein with rooms, attendants, fuel, lights and stationery suitable and sufficient for the transaction of their business. If the supervisors neglect, the court may order the sheriff to do so, and the expense incurred by him shall be a county charge. Section 51 of the code makes this section applicable to the superior court, court of common pleas and marine court of this city. If, therefore, the supervisors incur the expense, in compliance with the requirements of the code, such expense necessarily becomes a county charge. If it is incurred by the sheriff in pursuance of the order of the court, the law declares it shall be a county charge. The providing of rooms suitable and sufficient for the transaction of the business of the court, necessarily carries with it the authority to keep the rooms in suitable and convenient order, such as cleaning, painting, or other needful reparations, and if the one is a proper and legal county charge it follows that the other would be also. The amount therefore expended is a proper and legal county charge upon these grounds, and it having been audited and allowed by the board of supervisors, such audit is final and conclusive as to the amount, for the reasons above stated.

If there was no other obstacle in the way, I should grant the peremptory mandamus in each of the above cases, for the reasons stated in the opinion in the case of the people on the relation of *Downing* against this same defendant. But the legislature have thought proper to place restraints upon the action of the board of supervisors of this county, which do not exist in reference to the supervisors of any other county of this state, that I am aware of. At the session of the legislature held on the 12th of April, 1853, an act was passed, further to amend the

charter of the city of New York, which made many radical changes in reference to the city government, the management and disposition of its property; and the duties and liabilities of the officers of the city government; the organization of the courts therein, and the powers of the board of supervisors. Section 12 of that proposed act declares that all work to be done and supplies to be furnished for the corporation involving an expenditure of more than two hundred and fifty dollars, shall be by contract, founded on sealed bids, or on proposals, made in compliance with public notice, for the full period of ten days; and all such contracts when given, shall be given to the lowest bidder with adequate security. All such bids or proposals shall be opened by the heads of the departments advertising for them, in the presence of the comptroller and such of the parties making them as may desire to be present. Section 15 of the same proposed act declares "that no contract by the supervisors shall be valid unless expressly authorized by statute, and such as are authorized must be made in the manner provided by the twelfth section of this act."

The contracts in each of the above cases, it is apparent, were such as the supervisors were authorized to make, but it is further declared that such contracts must be made in the manner provided in the twelfth section. It is conceded that they were not so made; that the expenditure in each case was over the sum of $250; that no public notice was given at all for bids or sealed proposals; that none were received; and that the work was not done by contract. If this statute be the law of the state, it follows that the supervisors could create no legal liability against the county by having this work done, in direct violation of the provisions of this act; that no charge has been created against the county, and that this court not only should not award a peremptory mandamus to the county treasurer commanding him to pay these accounts, but that it would be its duty, on a proper application, to restrain him from so doing. Neither the corporation nor the board of supervisors can be bound or charged with a contract made contrary to law. The cases on this subject are too numerous and familiar to need citation. Neither can the

corporation or the board of supervisors assume and pay a debt not a legal obligation upon them. (*Hodges* v. *City of Buffalo*, 2 *Denio*, 110. *Halstead* v. *Mayor of New York*, 3 *Comst.* 430.) Neither will a mandamus be awarded to compel the county treasurer to pay an account audited and allowed by the board of supervisors which was not a legal county charge. (*People* v. *Lawrence*, 6 *Hill*, 244.) In this case the supervisors of the county of New York audited and allowed to the relator, Justice Merritt, his account for expenses incurred by him in defending himself as one of the special justices in the city of New York, on an impeachment and trial before the county court. The county treasurer refused to pay the account thus audited and allowed, and an application was made to this court for a mandamus to compel him. Bronson, J., in delivering the opinion of the court, says: "Whatever appearance of justice there may be in charging the expenses of the account upon the county, it is enough for us to say, that this consideration addresses itself exclusively to the legislature. If this had been a case where the supervisors had authority to allow the claim, I agree that it would have been the duty of the treasurer to pay, without inquiring whether the account had been allowed upon insufficient evidence or at too large an amount. But as the supervisors had no jurisdiction over the subject matter, and that fact appeared upon the face of the account presented for payment, their act was a mere nullity, and it was the duty of the treasurer to withhold payment."

So in the cases under consideration, it appears from the papers that the work was not done in the manner prescribed in the 12th and 15th sections of the amended charters of 1853, and the act of the supervisors in auditing and allowing the accounts was a mere nullity, and it was the duty of the treasurer not to pay them. This is on the assumption that the act of 1853 is a valid and constitutional law. I am aware that the application of these principles seems harsh, but with the hardship of the case I can have nothing to do. The legislature have made the law, and with them rests the responsibility. My duty is to expound and execute it as I find it, and the results flowing

from it, in cases like those now before me, may lead the legislature to a careful review of these provisions. These parties, mechanics, have rendered services and performed labor for the corporation and the county, and of which the public authorities have had the benefit, but through oversight or from motives not explained, the agents of these bodies have chosen to have this work done in a manner prohibited by law, and in a way which the law declares shall not be valid. While I may regret that in these particular cases I am compelled to come to this result, my duty to maintain the law as I find it is too clear to shrink from it.

But is the law of 1853, amending the charter, valid and constitutional? This question has been argued at great length, and with the ability and learning which might be expected from the distinguished counsel employed. It is insisted, on the part of the relators, that this act is void, because it was not in fact a law enacted by the legislature; that they delegated to the people of the city of New York, to say whether or not it should be a law of this state, and that such delegation was unconstitutional, for the reason that one portion of the people of the state cannot say what shall be a law for the whole state.

These suggestions are of force, and are not free from serious difficulty. Section 20 of this act provided that the said act should be submitted for the approval of the electors of the city and county of New York, at an election to be held in said city, on the 7th of June in that year; and if a majority of the tickets voted at such election contained an approval of said act, then the same should become a law. If a majority of the tickets voted at said election contained a disapproval of the act, then the said act should be void. Section 1 of article 3 of the constitution of this state declares, that the legislative power of this state shall be vested in a senate and assembly. Section 14 of said article declares, that the enacting clause of all bills shall be, "The people of the state of New York represented in senate and assembly, do enact as follows," and no law shall be enacted except by bill. Section 15 declares, that no bill shall be passed unless by the assent of a majority of the members

elected to each branch of the legislature. It is contended, on the part of the relators, that this submission of the question, whether the act should or should not become a law, is in conflict with the constitution, and that the act is unconstitutional and void.

A similar provision was inserted in the act passed March 20, 1849, in reference to free schools in this state. The 14th section of that act declares, that in case a majority of all the votes cast at the election to be held to vote in relation to the act should be cast against the law, then that act should be null and void, and in case a majority of all the votes should be cast for the law, then that act should become a law. The effect of such provisions in the school law, and of a similar proceeding to the one now under consideration, was passed upon by the court of appeals of this state, in the case of *Barto* v. *Himrod*, (4 *Seld.* 483;) Ruggles, C. J. in delivering the opinion of the court says, "It cannot be said that the propositions contained in that law, in relation to free schools, were enacted as law by the legislature. They were not law or to become law until they had received a majority of the votes of the people, at the general election, in their favor, nor unless they received such majority. It results, therefore, unavoidably from the terms of the act itself, that it was the popular vote which made the law. The legislature proposed the plan or project, and submitted it to the people to be passed or rejected. The legislature had no power to make such submission, nor had the people power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution." Willard, J. says, "The law under consideration is in conflict with the constitution, in various respects. Instead of becoming a law by the action of the organs appointed by the constitution for that purpose, it claims to become a law by the vote of the electors. And it claims that the popular vote may make it void, and restore the former law. All the safeguards which the constitution has provided are broken down, and the members of the legislature are allowed to evade the responsibility which belongs to their office. * * * If

this mode of legislation is permitted and becomes general, it will soon bring to a close the whole system of representative government, which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of lawgivers, and with just wisdom enough to devise subtle schemes of importance to mislead the people. All the checks against irresponsible legislation will be swept away, and the character of the constitution will be radically changed." This decision is conclusive upon the question as to the unconstitutionality of this act, if it is not distinguishable from the one passed upon in that case.

The counsel for the defendant contends that that act was an act to amend and alter the charter of the city of New York, and that it could not be constitutionally enacted without the assent of the electors of the city was obtained. This very point was passed upon by Allen, J., in the case of *Clark* v. *City of Rochester*, lately decided by him. In 1851 an act was passed by the legislature of this state, to amend the charter of the city of Rochester. (*Laws of* 1851, *ch.* 389.) Section 285 to 290, inclusive, provided for the subscription by the common council of the city of Rochester to the stock of the Rochester and Genesee Valley rail road company. Section 291 provided for submitting to the electors of the city of Rochester, whether those sections should take effect as a law. Section 292 declared, that if two-thirds of the votes cast were in favor of said sections, then the same were to take effect immediately on filing a certificate of such election. Judge Allen says, "The expediency of laws of this character is to be judged of only by the legislature, and they cannot shrink from the constitutional responsibility resting upon them. It is not the case of conferring new powers or additional franchises upon a private corporation, which the corporation may elect to accept or not as they may deem expedient.' So in the case now under consideration, the provisions of the act of 1853, now called in question, do not affect any of the franchises or property of the corporation, or confer any new powers or additional franchises upon it. They are but govern

mental regulations affecting the powers of the supervisors which it was competent for the legislature to make.

I must, therefore, hold, on the authority of these cases, that the act to amend the charter of 1853, so far, at least, as it seeks to make applicable to the board of supervisors, sections 12 and 15 of that act, is unconstitutional and void, if no subsequent legislation has removed the difficulty. The decision of the court of appeals in *Barto* v. *Himrod*, was pronounced in June, 1853, at about the time the election was held in the city of New York to vote upon this statute. This decision, as it is understood, was the main reason for the passage of the act of June 14, 1853, entitled "an act supplementary to an act entitled an act further to amend the charter of the city of New York, passed April 12, 1853." The fourth section of this act declares, that the same and the acts to which it is supplementary, (that is the act of April 12, 1853,) "shall commence and take effect, as laws, immediately." The counsel for the defendant contends that this was a re-passage of the act of April 12, 1853, and that thereby the legislature expressed its will that that act should immediately become a law. In this position, I am inclined to think he is correct. Regarding the cotemporaneous decision of the court of appeals, I cannot doubt that the legislature must have been aware that the act of April 12 was unconstitutional and void, and that they therefore and thereby re-enacted the same. It is to be observed that the act of June 14, 1853, is not entitled an act to amend the act of April 12, but as supplementary to it.

The great object of the rules and maxims for the interpretation of statutes is, in all cases if possible, to discover the true intention of the law; for this purpose it is necessary to ascertain what was the mind of the framers of a particular statute; and when that can be indubitably ascertained, the duty of the court is to give it effect, whatever may be their own opinion of its wisdom, expediency or policy. (*Smith's Com.* § 515.) I can have no doubt that it was the intention of the legislature to re-enact and declare their will, by section 4 of the act of June 14, that the act of April 12 should immediately become, and take effect as, a law,

and that it is the duty of this court so to regard the language used. Considering the will of the legislature thus declared, we must regard the act of April 12 as in fact enacted by the law of June 14, and the objections to the former in reference to its being dependent upon the will of the electors, whether or not it should become a law, as obviated.

I have not overlooked the objection so forcibly urged by the learned counsel for the relators, that the act of June 14, 1853, was but an amendment of that of April 12, and that an amendment of a void law did not make it valid. The case of *Bradley* v. *Baxter*, (15 *Barb.* 122,) is certainly an authority for this position, and if the act of June 14 was simply but an amendment of that of April 12, I should hold that it was no ratification of, and gave no vitality to that of April 12. By a reference to the act amending the school law of March 20, 1849, passed Jan. 31, 1850, (*Laws of* 1850, *chap.* 7,) it will be seen that the latter act only amends the 8th section of the former, and declares that the act of January 31 "shall take effect immediately." Pratt, J. in delivering the opinion of the court in the case last cited, says, "The legislature in passing the act, (that of March 20, 1849,) with the provision to submit the question to a vote of the people, assumed that the legislature as well as the people were vested with a power which we hold they do not possess. In amending the act, we have the right to suppose that they still labored under the same impression. They therefore, *only* intended to amend what they supposed to be a valid law of the land, and not to take the responsibility of re-enacting the law itself. An amendment made under such circumstances cannot have the effect to make a void law valid."

It seems to me that in this case the legislature did intend to take the responsibility of re-enacting the law itself, and that the language used is more broad and significant than the usual declaration, "that this act shall take effect immediately." I am, therefore, of the opinion that the provisions of the statute in reference to the duty of the supervisors, to have work done for them done by contract, are valid, and have been legally

enacted, and that consequently the relators have no legal claim against the county for the work thus done contrary to the provisions of law, and the motion for a peremptory mandamus in each case must be denied.

[New York Special Term, December 20, 1856. *Davies*, Justice.]

ARKENBURGH and EARLE *vs.* WOOD and others, commissioners of the sinking fund, and the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

Land belonging, originally, to the city of New-York, in fee simple absolute, was leased in perpetuity, at a small rent, to the officers of a religious corporation, for the purposes of a church and church yard, or cemetery, and subject to the condition of forfeiture should the lessees at any time "apply or convert the same to private or secular uses." By an ordinance of the common council, duly passed in 1844, authority was given to the commissioners of the sinking fund "to sell and dispose of all *real estate* belonging to the corporation and not in use for, or *reserved for public purposes.*"

Held, 1. That the property leased to the corporation was not in use for *public* purposes, within the meaning of the ordinance; the exception having reference to the parks, squares, court-houses, alms-houses, engine-houses, and other grounds and buildings of that nature, possessing a general city character and devoted to general city uses, other than mere revenue, and not to grounds occupied by a particular denomination of christians for their exclusive and special benefit.

2. That so far as the exception contained in the ordinance was concerned, the commissioners of the sinking fund had authority to sell the property in question.

3. That a contract, made by the commissioners, for the sale and release of the city's interest in the premises was either valid or void; if valid, that there was no *ground* for interference by injunction; and if void, that there was no *occasion* for interference.

4. That as to the trustees of the church, their interest was a vendible title. And the law would intend, until an overt act to the contrary was done, that the purchasers of that title contemplated either a continued devotion of the premises to the purposes of "public worship," as prescribed in the grant, or a regular dispensation from the stipulated observance, to be obtained from the common council.

5. That should the purchasers, treating such dispensation as unnecessary, con-

vert the premises to secular uses, and thereby incur the forfeiture, the consequence, on that assumption, being, if enforced, a benefit instead of injury, to the tax-payers, would afford no ground of complaint on their behalf, or for an injunction.

The commissioners of the sinking fund, under their general authority to dispose of all the real estate of the city of New York, not in use for public purposes, have no power to release, or to bind the corporation to release, the condition of an ancient grant, requiring the grantees, on pain of forfeiture, to devote forever the premises granted, to religious and not secular uses. Such a diversion of the property from the purposes originally contemplated, can only be authorized or ratified by a resolution of the common council, duly passed by both boards, in one and the same year.

No corporator or tax-payer, individually, or on behalf of himself and all others, can sue for an injury to, or a misapplication of, the corporate property or franchises, except in cases of fraud, corruption, or violation of law on the part of the functionaries intrusted with the corporate powers and duties.

THIS suit was brought to test the validity of the sale of the plot of ground on which the edifice commonly known as the Brick Church stands. It was instituted, not by the corporation of the city, but by individual citizens, on behalf of themselves and all other tax-payers, against the corporation and the commissioners of the sinking fund. The plaintiffs alleged that the consideration to be paid to the city, on the sale complained of, was far below the real value of the city's reserved rights in the premises, and that the mode of disposing of those rights, although nominally by public auction, as required by law, was really in consequence of a previous adjustment of the proportionate shares of the city and the church, by private bargain; and that the consummation of the arrangement would be a great sacrifice of the public property, entailing a corresponding increase of individual taxation, and ought therefore, by way of preventive remedy, to be perpetually enjoined, according to the prayer of the complaint. To this complaint, the commissioners of the sinking fund and the corporation of the city, the only parties named as defendants, interposed a demurrer, on the ground, among others, that admitting all the allegations made in the complaint to be true, the plaintiffs had no right, in this action, to the decree which they asked for.

ROOSEVELT, J. The ground in question belonged originally to the city in fee simple absolute, and was leased in perpetuity, at a small rent, to the officers of the corporation. for the purposes of a church, and church-yard or cemetery, and subject to the condition of forfeiture should the parties at any time "apply or convert the same to private, or secular uses." Under such a lease in fee, two rights, it will be seen, were reserved to the city: one a right to re-enter for non-payment of rent; the other, a right to re-enter for breach of condition. And the question—one at least of the questions—is, what is the legal character of these reserved rights, and who has the legal power to dispose of them, and in what manner?

By the city ordinance, duly passed in 1844, authority was given to the commissioners of the sinking fund "to sell and dispose of all *real estate* belonging to the corporation, and not in use for, or reserved for public purposes." That the brick church property was not in use for *public* purposes, within the meaning of the ordinance, has already been decided on the motion made for a preliminary injunction. The exception, it was held, had reference to the parks, squares, court-houses, alms-houses, engine-houses, penitentiaries, and other grounds and buildings of that nature, having a general city character and devoted to general city uses other than mere revenue, and not to grounds occupied by a particular denomination of Christians, for their exclusive and special benefit, and in which no other denomination, nor other congregation of the same denomination, could participate. Such a limited and partial appropriation, it was held, was not a reservation for public use. The purpose was to advance the interests of the "First Presbyterian Church"—a purpose which, however laudable, was not a "public purpose," within the meaning of the law in this country, where the union of church and state, under its present form of government, is in effect prohibited. If this view of the meaning of the words "reserved for public purposes" be correct, then so far as the exception contained in the ordinance is concerned, the commissioners had authority to sell, and the first difficulty in the case is removed.

The next difficulty arises out of the suggestion that the prop-

erty in question is the "real estate" of the church, and not of the city. As I understand the law on this subject, it is both. Where a lease in perpetuity is granted, reserving rent, the right to rent issuing out of the land is as much "real estate belonging to the lessor," as the right to the occupancy of the land itself, is "real estate belonging to the lessee." And it descends to heirs and may be sold and conveyed to purchasers in the same manner. (1 *R. S.* 748.) There is besides a peculiar fitness in placing such a species of property at the disposal of the commissioners of the sinking fund to pay the city debts. It is an interest which can be readily estimated and has no other than a pecuniary value. It may well, therefore, be comprehended in a power to sell "all the real estate belonging to the city not reserved for public purposes." But the right to require that the land granted should be devoted to church purposes, and to re-enter in case of breach of the condition, it may well be argued, stands upon a different footing. The grant, it must be remembered, was made under the colonial system. Its date is ten years prior to the declaration of independence. And its language, therefore, must be interpreted by the rules of law and public policy which then prevailed. Under those rules it was competent to the then city government, "the worshipful, the mayor, aldermen and commonalty," to make a grant to "the English Presbyterian Church, of the city of New York, according to the Westminster confession of faith, catechism and directory, and agreeable to the then Church of Scotland," and to require, as a condition of its continuance, that the property, although granted "forever," should not at any time be "converted to private, secular uses," on pain of forfeiture. The British constitution in 1766 was, as it is still, a union of church and state. It recognized the principle of special privileges, both secular and ecclesiastical—a principle which continued in full force until the revolution, or until the adoption of the state constitution in 1777, abolishing, from that time forth, "all discrimination or preference in religious profession and worship."

Bearing this fact in mind, we are to inquire what was the meaning of an inhibition against "private secular uses," in a

city grant made in 1766? For that purpose the whole instrument, and the prior and attending circumstances, must be taken together. From these it appears clearly that the object of the petitioners in asking, and the meaning of the city corporation in making, the grant, was, that the plot of ground in question should be devoted to the erection of "an edifice or church, (with its accompanying cemetery,) for the public worship of Almighty God," and that it should be applied, on pain of forfeiture, to no other use, all other uses being designated as "private secular uses," inconsistent with the scope and intent of the grant. The expression "private secular" was not used as contradistinguished from public secular. The prohibition, in which it occurs, was merely a negative mode of reiterating the direct purpose of the grant, which, as already stated, was the public worship of the Supreme Being, and not a public "secular" use, however beneficial. Any "appropriation, application or conversion," therefore, of the premises to worldly objects, without the consent of the grantors or their successors, the present corporation of the city, would, by the terms and spirit of the instrument, at the option of the city government, work a forfeiture, and authorize a re-entry reinstating the grantors in their original estate. The question then arises, have the corporation given any consent waiving this condition of the grant? None is set up in the pleadings, and the demurrer admits that none was given. And if I were allowed to look into the affidavits, read on a former motion, it would appear that, although a resolution to that effect was passed by both boards of the common council, yet, having been adopted by one board in one year, and concurred in by the other board in a subsequent year, it was void, as contrary to the city charter.

Should it be said that the corporation had assented to the waiver by the act of their agents the commissioners of the sinking fund, the answer must be that a power to sell the "real estate" of the city, and to sell it only for financial purposes, (the limit of the commissioners' authority) is not a power to release a condition not pecuniary, attached to real estate already disposed of, and disposed of subject to such condition and with an express

view to religious and not pecuniary uses. And if the commissioners had no power without a special resolution of the common council, to release the condition and defeat the leading object of the grant, how could they dispose of the right of re-entry which had been reserved solely as the means of enforcing compliance? As to the rent reserved, that of course was a mere matter of pounds, sterling or currency. Being reserved too in perpetuity, it was what the law denominates a hereditament. This rent therefore was real estate, subject as such to the disposal of the commissioners for the benefit of the sinking fund. But does the right to sell the pecuniary rent necessarily carry with it the right to waive the religious condition? Upon further reflection, since the argument of the motion for a preliminary injunction, I am inclined to think it does not. The sinking fund ordinance was a delegation of power to be construed reasonably to effectuate, and not to transcend, the intent. Its object was to raise money and to pay debts. No person reading it would suppose its authors had the subject of religious worship in view, or contemplated giving or surrendering any authority in such matters. Yet the commissioners, in the advertisement of sale signed by them, stipulate that "the corporation will execute a release of all conditions in said grant," as well as of "all their estate, right, title and interest in the premises."

Admitting, however, that the commissioners had no power to release such a condition, or to bind the corporation to do it, their act would be simply void, and any conveyance founded on it, unless sanctioned by an express resolution of the common council, would be a nullity. Why then, issue an injunction? The tax-payers will suffer no injury by the sale. All the loss, if any, will fall upon the purchasers. It is not pretended that the common council contemplate ratifying the void act (if it be void) of the commissioners. On the contrary, the averments in the complaint would seem to imply that they repudiate the transaction. What occasion then for the intervention of the tax-payers? The right to sue, in their names, does not extend to every case or to cases generally. Ordinarily, the remedy is in the corporate body and not in the individual corporators. To justify a

departure from the usual mode of proceeding, the tax-payer must show an unlawful act to his prejudice, done or threatened by the corporation itself, or fraudulently connived at by them. If the act involves an injury to the city treasury, and a consequent increase of taxation, it is for the corporation in the first instance, as the representatives by law of all the tax-payers, to take the proper steps to obtain redress, or to prevent the threatened mischief. Should the corporation illegally or corruptly fail to do its duty, which is not to be presumed without proof, certainly not without averment, it will be time enough then for the constituent to interpose. On the case stated in the complaint there is no occasion for any exceptional mode of procedure; and for that reason alone, were there no other, the suit would have to be dismissed.

Not only, however, are the wrong parties brought in, as plaintiffs, but the right parties are left out as defendants. The purchasers, it is obvious, have a claim to be heard, in any view of the controversy; whereas the tax-payers individually on the case as it stands, or rather as is represented by themselves, have no such claim. Either objection is fatal. The code, § 144, enumerates among the grounds of demurrer demanding a dismissal of the complaint, a want in the plaintiff of "legal capacity to sue," or a "defect of parties plaintiff or defendant.'

Supposing, however, that the proceeding were amended, and that it stood now as a suit by the proper parties, and against the proper parties, and liable to no objection of form, what, on that assumption, would be the proper determination of the questions involved?

First. Was the resolution which passed the respective boards of the city government of two different years, purporting to release the condition contained in the grant of their predecessors to the church, an act of the common council, within the meaning of the amended charter of the city?

Second. If a resolution so passed was not an act of the common council, (and such is the decision of the general term,) was the general power which the corporation had regularly delegated to the commissioners by the sinking fund ordinance, to sell and dispose of all the real estate of the city not in use for public

purposes, sufficiently extensive to enable the commissioners alone, without a special resolution of the common council, to execute a release of a condition, valid certainly at the time it was imposed, in favor of "public worship" and the promotion of the Christian religion?

Third. And if the sinking fund ordinance contained no such delegation of power, (and it appears to me it did not,) and if, as a necessary consequence, the release of the commissioners, whether in their own name or that of the corporation, must be void, would there still be any sufficient ground for a decree to prevent the delivery, nevertheless, of a deed in execution of the unauthorized contract of sale?

The deed, so far as it might purport to release the condition, would, if the views above expressed are correct, be a mere nullity; and if the purchasers, relying upon it, should buy and pay for the land with an *intent*, contrary to the condition, to apply it to secular uses, no wrong as yet would be done, until the intent should be followed, as it might never be, by an actual conversion to the prohibited uses without first obtaining the consent of the common council. Such a "conversion" in fact, by the terms of the original grant, would alone work a forfeiture. Mere intent is no breach of the condition. And if it were, the only consequence would be a re-entry as provided in the grant—a consequence which, in the altered circumstances of that portion of the city, instead of prejudicing, would be highly beneficial to the tax-payers. Why then should the extraordinary jurisdiction of the court be invoked on their behalf to prevent it? An injunction, whether preliminary or final, presupposes an "injury," or "a threatened *injury* or violation of the plaintiff's rights." (*Code*, § 219.) An injunction issued at the instance of a plaintiff to prevent a threatened *benefit*, would certainly be a judicial novelty; and its being in the form of a final decree, instead of an interlocutory order, would not make it less repugnant to both principle and precedent. But the plaintiffs ask an injunction against "the mayor, aldermen and commonalty," as well as the commissioners, and yet they aver in effect in their complaint that the corporation have done nothing wrong themselves, and

nothing to warrant any wrong of the commissioners. Nor is any contemplated wrong alleged against them. Why, then, should the corporation be impleaded and subjected to the costs of an action? The corporation, besides, in the exercise of an honest and *bona fide* discretion, (and no corrupt motives are charged,) have the legal right, should the public interests in their judgment demand it, to dispense for the future with the disputed condition. Such a dispensation, indeed, it appears was applied for, and was supposed to have been obtained. And if the resolution passed for that purpose was, as has been adjudged, void for want of conformity in the mode of its adoption, with the principles of the new charter, another and valid one, if proper, can no doubt be obtained. At all events, Mr. James and his associates have fairly purchased the title of the *church*, and, as "their assigns," in the language of the grant, have full power and authority to convert the premises to whatever uses the grant may warrant. And as to the officers of the church, the only deed, which by the terms of sale set forth in the complaint, *they* undertook to give, was, "a deed in conformity to the original grant of the corporation," and subject, therefore, of course to the condition, unless duly released, of applying the premises only to the use of a church and church-yard. It may be said that Mr. James and his associates *contemplate* diverting the property to secular uses, and that *they* should be enjoined, by way of preventive remedy, from carrying out their prohibited design. But Mr. James and his associate purchasers are not parties to the suit; and if they were, the grant, as already suggested, provides a different and the only remedy for such a case, and one, as matters now stand, far more beneficial to the tax-payers—a retrocession of the property to the city, by operation of law. "It shall and may be lawful, (says the grant, in the event referred to,) for the mayor, aldermen and commonalty of the city of New York and their successors and assigns into all and singular the aforesaid premises with the appurtenances to re-enter and to hold the same to them and their successors as of their former estate, any thing in the grant contained to the contrary notwithstanding." Neither the officers of the church, therefore, nor the purchasers from

the church, can be compelled by injunction to devote the premises to public worship. They have a right by contract to elect if they see fit (which they are not very likely to do) to submit to the prescribed forfeiture—a forfeiture of which the common council may or may not avail themselves, and which if enforced, would, according to the statement in the complaint, be a benefit, instead of an injury, to the tax-payers, to the extent of "Four hundred thousand dollars and upwards," that being, as the plaintiffs allege, "the real value" of the property to be forfeited.

In every view of the case, therefore, whether the court confines itself technically to the statements in the complaint, or looks beyond, to facts presented on the former motion, there is no ground for this action either in its present shape or in any other into which it could be transformed by the usual leave to amend. The complaint consequently can only be dismissed with costs.

To prevent any misapprehension, I have made out the following summary of the principal points of the decision:

First. So far as the acts of the commissioners are concerned, either the contract made by them for the sale and release of the city's interest in the premises, was authorized by law or it was not; in other words, it was either valid or void. If valid there is no *ground* for interference—if void there is no *occasion* for interference.

Second. As to the trustees of the church, *their* interest (an estate in fee, although subject to rents and conditions) was, in its nature, as well as from the use of the term "assigns" in the grant, a vendible title. And the law will intend, until an overt act to the contrary is done, that the purchasers of that title contemplate either a continued devotion of the premises to the purposes of "public worship," as prescribed in the grant, or a regular dispensation from the stipulated observance, to be obtained, in a proper manner, from the common council of the city, and upon such terms as that body, in the exercise of the discretion reposed in them by the charter, may deem just alike to their constituents and to the purchasers.

Third. Or should the purchasers, treating such dispensation as unnecessary, convert the premises immediately to secular

uses, and thereby, if such be the true law of the case, incur the forfeiture provided for in the grant, the consequence, on that assumption being, if enforced, a great benefit instead of injury to the tax-payers, will afford no ground on their behalf for complaint, and of course none for an injunction to anticipate its occurrence.

Fourth. The commissioners of the sinking fund, it would seem, under their general authority to dispose of all real estate of the city not in use for public purposes, have no power to release, or to bind the corporation to release, the condition of an ancient grant requiring the grantees, on pain of forfeiture, to devote forever the premises granted to religious and not secular uses. Such a diversion of the property from the purposes originally contemplated, can alone be authorized or ratified by a resolution of the common council, duly passed by both boards in one and the same year, according to the present charter.

Fifth. No corporator or tax-payer, individually, or on behalf of himself and all others, can sue for an injury to, or a misapplication of, the corporate property or franchises, except in cases of fraud, corruption, or violation of law on the part of the functionaries intrusted with the corporate powers and duties.

Complaint dismissed, with costs.

[New York Special Term, December 22, 1856. *Roosevelt*, Justice.]

Gillespie and Coryell *vs.* Broas and others.

The words "a good unincumbered title," in the 18th section of the act of April 14, 1854, erecting the county of Schuyler, mean a title in fee simple absolute, free and clear from any legal exception or charge thereon. They import an estate without any prior claim, to continue forever, and having no qualification or condition in regard to its continuance.

Accordingly *held* that a deed conveying land to the supervisors, "for the use of the people of the county of Schuyler as long as said lot or premises shall be and are occupied for a county site for the court house, jail and clerk's office of said county of Schuyler; and when said lot or premises shall cease to be

used for the purposes aforesaid, then the same with its appurtenances &c. is to revert and belong to the said party of the first part, his heirs &c., the same as if this conveyance had not been executed"—was not a compliance with the act, and did not convey such a title as was contemplated by it. WELLES, J., dissented.

Held also, that a good title to the premises selected for a site by the commissioners appointed for that purpose, not having been made, to the county, within the time prescribed, the selection became wholly inoperative, and notice should have been given, as directed by the act, to the commissioners, who should thereupon have made another selection.

Held further, that another selection of a site was a condition precedent to the right of the building commissioners to enter into a contract for the erection of public buildings; and that a contract for the erection of buildings, entered into without a second selection having been made, being, on the part of the building commissioners, without authority, imposed no obligation on the county, and the contractors who erected the buildings had no valid claim against the county therefor. WELLES, J., dissented.

Upon a complaint by individuals claiming to be residents of the county of Schuyler, owning real and personal property and being tax-payers therein, praying for an injunction to restrain the payment of the sum of $3000, (voted to be raised by the board of supervisors,) on orders issued to D. and N. in part payment for the erection of a court house, jail and clerk's office upon a site selected by the board of supervisors, under a contract between D. and N. and the supervisors; on the ground that the supervisors had no authority to establish a site or enter into the contract, and hence none to issue the orders, and that the orders were not, therefore, a valid claim against the county; the plaintiffs not suing in behalf of other tax-payers as well as themselves, and the county not being made a party to the action;

Held that, assuming that the supervisors had no power to select a site for the buildings, and that the orders to D. & N. were therefore issued without authority, this was not a case for the interposition of the court by the extraordinary remedy of injunction; a *certiorari* to reverse the adjudication of the board of supervisors upon the claim, being the proper remedy. WELLES, J., dissented.

The review and correction of errors of that nature is not within the equitable jurisdiction of the supreme court, with which an injunction is connected, but belongs to its legal jurisdiction, which is to be exercised by writ of certiorari, or in some other strictly legal mode.

But neither a certiorari nor an injunction is proper where the allowance of a claim by a board of supervisors was merely erroneous, and not void.

A board of supervisors, having authority to commence suits, although they misjudge in regard to their having a cause of action, in a particular case, the fair charges of the attorneys and counsel employed by them, are a legal demand against the county; and after the amount of such charges has been allowed by the board, and orders issued therefor, the payment of such orders will not be restrained by injunction.

Gillespie *v.* Broas.

THIS was an appeal from an order of Justice SMITH, denying a motion to vacate an injunction order granted by Justice WELLES. The facts set forth in the complaint were these: that in April, 1854, the legislature passed a law erecting the county of Schuyler, and appointed commissioners to select a site for a court house, jail and clerk's office. That within the proper time the site was selected at Havana and a deed therefor given by the owner of the land, Charles Cook. That other commissioners were appointed by said act to superintend the erection of said court house, jail and clerk's office, and purchase materials and contract with workmen for the building thereof. That before entering upon the duties of the commission, they were required to execute a bond with approved sureties, to the supervisors of the county. That such bond was properly executed. That said commissioners entered upon the duties of the commission, purchased materials and contracted with workmen for the erection of the said buildings, and at the commencement of this suit the said court house, jail and clerk's office were completed upon the site selected by the locating commissioners appointed by the legislature, and orders given to the contractors therefor, upon the county treasurer, to the amount of $14,000. The complaint further alleged that soon after the location of the site as aforesaid, a majority of the supervisors of said county passed a resolution ignoring the provisions of the act aforesaid, and passed another resolution fixing a site for a court house, jail and clerk's office at Watkins, about three miles from Havana, and made a contract with Drake and Newman, two of the defendants, for the erection of a court house, jail and clerk's office upon such site; and that at the annual meeting of the supervisors in November, 1855, a resolution was passed authorizing the sum of $3000 to be levied and assessed upon the taxable property of said county, to be applied towards the payment of the cost of erecting "a court house, jail and clerk's office," and directing orders to be issued to said Drake and Newman; and that such sum was assessed upon the taxable property, and warrants issued to the town collectors for the collection thereof, and orders issued to said Drake and Newman

for that amount. The complaint further alleged that the said supervisors assessed upon the taxable property of said county $297.40 to pay for counsel fees, &c. in a suit commenced by them and others, which it was alleged they had no right to commence in behalf of the county, and they asked to have the payment enjoined. The plaintiffs are the contractors of the building commissioners, hold their orders upon the treasurer to the amount of $14,000, and are tax-payers of said county. They asked for an injunction to restrain the payment of said $3000 to Drake and Newman, for the reason that the supervisors had no right to select a site or make such a contract, and because their whole proceedings were illegal and void. They further asked for a decree for the payment of said $3000 to them as contractors.

The answer of the defendants did not deny the material allegations of the complaint, but set up certain alleged defects and irregularities, in excuse of the conduct of the supervisors. The defendants admitted upon information and belief, that the commissioners appointed to select a site for the county buildings selected a site in the village of Havana, described the land in writing and signed the same, which paper was duly filed by them, and a copy delivered to the building commissioners, who gave notice thereof to the owner of the lot. But they denied that the owner of the lot, within twenty days thereafter, made a good unincumbered title therefor to the supervisors of the county for the use of the people of the county of Schuyler, as required by the act of the legislature. They however admitted that he executed a deed, conveying an imperfect and incumbered title, which the supervisors were not authorized to, and did not, accept; whereby the said selection of a site became void and inoperative. They alleged that the deed contained the following unlawful exceptions and reservations, to wit: it provided that the grant of the said premises was to continue only "as long as said lot or premises shall be used or occupied for a county site for the court house, jail and clerk's office of said county of Schuyler, and when said lot or premises shall cease to be used for the purposes aforesaid, then

the same, with its appurtenances thereunto belonging, is to revert and belong to the said party of the first part, his heirs, executors, administrators or assigns, the same as if this conveyance had not been executed. The buildings now upon the above described lot or premises are hereby reserved, with the right to re-enter upon and remove the same from the said lot or premises." Wherefore the said board of supervisors were not authorized to, and did not, accept said deed, and refused so to do, and the said lot ceased to be, and did not become the site for said buildings; and the building commissioners had no power or authority to build thereon, or contract for the erection of said buildings thereon. Of all which the plaintiffs had information and notice, and that they contracted to build, and had built thereon in their own wrong, and without authority of law. The defendants also alleged that the building committee did not, before entering upon the duties of their office, or at any other time, give bonds with approved sureties to the supervisors, for the faithful expenditure of the moneys committed to their charge, as required by the act, and therefore had no authority to enter into the contract with the plaintiffs, on behalf of the county; and that the plaintiffs had no claim upon the county or its funds, by reason thereof. The defendants also alleged that at the time the plaintiffs made the contract with the building commissioners, for the erection of the public buildings, the board of supervisors had not decided what sum (not exceeding $15,000,) should be raised to erect the same, or how the money should be raised; wherefore the commissioners had no power to contract on behalf of the county, with the plaintiffs, for the erection of the buildings; of which the plaintiffs had full knowledge and information. The defendants further alleged that the plaintiffs willfully, knowingly and unlawfully erected said buildings on lands not belonging to the county of Schuyler, and not the site for the court house, jail and clerk's office, without any contract with, or authority from, said county or its authorized and legal agents, and against the request and in defiance of the authority of the lawful agents and representatives of said county; and

that they had therefore no claims on the county to be compensated therefor, &c.

An injunction order was granted restraining the defendant Broas from receiving or paying the orders mentioned in the complaint as given or directed to be given and issued to Drake and Newman, out of any moneys in the treasury of Schuyler county, or out of any moneys raised by tax in said county; and restraining him from paying any or either of the orders stated in the complaint as given for counsel fees, out of any moneys in the treasury of said county or belonging to or levied and collected by said county. And the defendants Reynolds, Earle, Coon, Carpenter and Drake were restrained from receiving any or either of the said orders, in payment of taxes collected or to be collected by them, in said county, or of their several towns, and from paying the said orders out of any moneys collected or received by them as taxes. Drake and Newman were restrained from collecting or transferring the said orders or any or either of them. On the pleadings and proceedings, and upon affidavits, a motion was made by the defendants, at a special term held in the county of Steuben, in January, 1856, for an order to dissolve or vacate the injunction order. This motion was denied, without costs to either party, and the defendants appealed to the general term.

Dana, Beers & Howard, for the appellants.

J. McGuire, for the respondents.

T. R. Strong, J. The words "a good unincumbered title," in the 18th section of the act erecting the county of Schuyler, mean a title in fee simple absolute, free and clear from any legal exception or charge thereon. They import an estate without any prior claim, to continue forever, and having no qualification or condition in regard to its continuance. This is the just interpretation of the phrase, separately considered. A "title" is, by the section, to be made to the county, and a title, without any qualifying words, includes the entire estate in the

premises; it is to be a "good" title, that is, in its unrestricted signification, a perfect title; and the title is to be "unincumbered," not bound by, or subject to, any thing in the nature of a lien or burden upon it. And there is nothing in the act indicating that any different estate was intended by the legislature. (*See Rexford* v. *Knight*, 1 *Kern.* 308; *Heyward* v. *The Mayor of New York*, 3 *Seld.* 214.) The legislature doubtless intended that the county should have such a title to the premises, that if it should, at any future period, desire to change the site of the public buildings, the premises could be freely conveyed away or appropriated to another use; that there should be nothing connected with the title that might operate as an obstacle to such a change.

The deed of Cook does not purport to convey such a title. The duration of the estate in the premises, is, in terms, specified to be as long as they "shall be used and occupied for a county site for the court house, jail and clerk's office of said county of Schuyler;" and a limitation of the estate to that period is expressly imposed, by adding, that "when said lot or premises shall cease to be used for the purposes aforesaid, then the same, with its appurtenances thereunto belonging, is to revert and belong to the party of the first part, his heirs, executors, administrators or assigns, the same as if this conveyance had not been executed." The effect of this specification and limitation is to make the estate a qualified or determinable fee—an estate which may continue forever, but which is defeasible or conditional on an event provided for. If the county should cease to use the lot or premises in the manner mentioned, the estate created by the deed would thereby be determined; and the title to the premises, including all buildings thereon, be revested in the grantor or his heirs. (4 *Kent's Com.* 9, 129.)

A title, in conformity to the act, to the premises selected by the commissioners appointed to select a site, not having been made to the county within the time prescribed, the selection became wholly inoperative, and notice should have been given as directed by the act, to the commissioners, and they should thereupon have proceeded to make another selection. Another se-

lection was a condition precedent to the authority of the building commissioners to enter into a contract for the erection of buildings. Those commissioners were appointed, in the language of the act, "to superintend the erection and building of the court house, jail and clerk's office for said county on such site or sites within the said county as shall have been designated and conveyed to the said county under the provisions of the last preceding section." (§ 19.) The contract for the building, made without another selection, being on the part of the building commissioners without authority, imposed no obligation on the county, and the plaintiffs have no valid claim against it for erecting the buildings.

This disposes of the case so far as the plaintiffs seek to have $3000, voted to be raised by the board of supervisors, and in process of collection, paid to them on the orders of the building commissioners in their favor upon the county treasurer; and it is unnecessary to consider other questions connected with that part of the case.

Another branch of the case is, that the plaintiffs seek an injunction to restrain the payment of the said $3000, or any funds of the county, on county orders issued to Drake and Newman, towards payment for the erection of a court house, jail and clerk's office for said county, upon a site selected by the board of supervisors, under a contract with the county by the board, on the ground that the supervisors had no authority to establish a site or enter into the contract, and hence none to issue the orders, and that the orders are not therefore a valid claim against the county. No complaint is made of the action of the board of supervisors in voting to raise a tax; the collection of the tax is not sought to be restrained, but only the payment of the amount of it when collected, or other funds of the county, on those orders. The plaintiffs rest their title to sue for this relief upon allegations that they are residents of the county of Schuyler, and own real and personal property therein, assessable and taxable in said county, and now assessed and taxed therein; that they are tax-payers therein, and that their property is assessed towards the payment of the said $3000. To

what sum their property is assessed, or what amount of tax is imposed on them in reference to this $3000 is not stated. They do not sue in behalf of other tax-payers, as well as themselves; but the action is brought for their sole benefit. For aught that appears no one objects to the payment of the money on the orders but the plaintiffs. And the county is not made a party to the action. This is not a case for the interposition of the court by the extraordinary remedy of injunction. Assuming that the supervisors had no power to select a site for the buildings, which I am inclined to think is the case, as the legislature had provided for another selection by the locating commissioners in the event which had occurred, and assuming that the orders to Drake and Newman were therefore issued without authority, it is not shown that Drake and Newman have not in good faith performed labor for the county for which they ought in good conscience to be paid the amount of the orders. It does not appear that any serious injury would be sustained by the plaintiffs, as tax-payers, by the payment of the orders by the county; and the county, by the board of supervisors, is not, as it should be, before the court. (*See Reynolds* v. *The Mayor of Albany*, 8 *Barb.* 597.)

Besides, if the supervisors had not authority to allow the claim of Drake and Newman and issue orders, I am inclined to think a certiorari to reverse their adjudication upon the claim was the proper remedy. (*Mooers* v. *Smedley*, 6 *John. Ch.* 28. *The Mayor &c. of Brooklyn* v. *Meserole*, 26 *Wend.* 132. *Livingston* v. *Hollenbeck*, 4 *Barb.* 10. *Van Rensselaer* v. *Kidd*, *Id.* 17. *Supervisors of Onondaga* v. *Briggs*, 2 *Denio*, 26.) In *Mooers* v. *Smedley*, Chancellor Kent says: "I cannot find by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors, in the examination and allowance of accounts as chargeable against their county or any of its towns, and in causing the money so allowed to be raised and levied." And again, "The review and correction of all errors, mistakes and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official

acts of public officers, belongs to the supreme court. In my opinion, it belongs exclusively to that court. It has always been a matter of legal, and never a matter of equitable cognizance." The other cases cited are to the same effect. The doctrine applied to the supreme court, with its present general jurisdiction in equity as well as law, is, that the review and correction of such errors is not within the equitable jurisdiction of the court, with which an injunction is connected, but belongs to its legal jurisdiction, which is to be exercised by writ of certiorari, or in some other strictly legal mode. Neither a certiorari nor an injunction would be proper, if the allowance of the claim was merely erroneous, and not void. (*Same authorities. The People* v. *Goodwin*, 1 *Seld.* 568.)

The plaintiffs had at least the ordinary remedy of the taxpayers, of displacing their public agents with whose action they are not satisfied, to which, with such other remedies as the laws may afford, they should have been left.)

I do not see any ground for restraining the payment of the orders for the $297.40 for costs, expenses and counsel fees in the suit mentioned in the pleadings, which is the residue of the relief asked by the plaintiffs. Most of what is said on the part of the case last above considered, is applicable to this. I will merely add, that I think as the supervisors have authority to commence suits, although they misjudged in regard to their having a cause of action in the suit in which the costs &c. were incurred, the fair charges of the attorneys and counsel employed by them were a legal demand against the county.

My conclusion, therefore, is that the order appealed from, refusing to vacate the injunction, should be reversed, with $10 costs, and that the injunction order should be vacated.

E. Darwin Smith, J. We are called upon to interpret the 18th section of the act to erect the county of Schuyler. The commissioners therein named are authorized and directed impartially to determine and select a proper site or sites for the court house, jail and clerk's office, to be erected in said county, and after the selection of such site they are required to imme-

diately reduce such determination to writing, giving a description of the lot or lots selected therein, affix their signatures thereto, and cause the same to be filed in the office of the clerk of the county of Chemung, and deliver a copy thereof to one or more of the commissioners named in the 19th section, for the erection of the said county buildings. The last mentioned commissioners are required forthwith to notify the owner or owners of such premises so selected, and in case a *good, unincumbered title*, free of charge or expense to the board of supervisors of the county of Schuyler, for the use of the people of the county of Schuyler, for such premises, is made to the said county of Schuyler, and delivered within twenty days after such notice to the owner or owners as aforesaid, then such determination and location shall be final and conclusive. The commissioners to locate the county buildings under the said 18th section, have performed their duty, and due notice of the selection was given to the owner of the premises so selected, and a deed thereupon executed to the board of supervisors of the said county, sufficient in all respects, except that it contained the following clause: "As long as said lot or premises shall be used and occupied for the county site of the court house, jail and clerk's office of said county of Schuyler; and when said lot shall cease to be used for the purpose aforesaid, then the same, with the appurtenances thereunto belonging, is to revert and belong to the said party of the first part, &c. as if this conveyance had not been executed." The chief question for our decision is, whether a deed, with the above qualification or provision, conveys a *good, unincumbered title.*

The premises are to be conveyed to the supervisors "*for the use of the people of the said county of Schuyler.*" The title to be conveyed, I think, was to be such as the people of the state, or the people of the county of Schuyler would acquire, if they had taken the land or premises in question by the right of eminent domain for the public use, and with payment of a just compensation therefor; just such title as the state acquires when it takes land by deed or grant for a canal or other public use, and pays by agreement or in appraisement, the full value or price

there f. In such cases the state takes a fee, a fee simple absolute, unless a lesser estate is expressly specified or clearly intended. (*Rexford* v. *Knight*, 1 *Kernan*, 314. 2 *id.* 128. *Heyward* v. *Mayor of N. Y.*, 3 *Seld.* 314.) Here the county were to have a *good title*. *Title* of itself to real estate implies an estate in fee; nothing short is a complete title. The language of the act is a *good title*. A good title can be nothing less than a legal estate in fee, an estate *indefeasible*. (*Jones* v. *Gardner*, 10 *John.* 266. 12 *N. H. Rep.* 88. 2 *Serg. & R.* 50. 14 *Barb.* 424.) Such would be the construction of an agreement between individuals. A contract to give a good title to real estate, will be held to require a deed in fee, that should, in effect, give a perfect title. (17 *Wend.* 244. 23 *id.* 66. 2 *John.* 595. 11 *id.* 525. 1 *Denio*, 544.) The estate conveyed by this deed is not a fee simple absolute. It is a *qualified, base or determinable* fee. (4 *Kent*, 9, 129. 2 *Black.* 109, 154, 55. 2 *Bouv.* 217.) The language of the statute is, "a good, unincumbered title." The qualification in the deed is not an *incumbrance*. The language of the act should be interpreted to read—and I think does mean—a *good title free and clear of all incumbrance*. No incumbrance is shown that would avoid the deed; but the counsel for the plaintiff claims, that the county was to have a title only for particular purposes, to wit, for a county jail and court house, and that we are to look at the intention of the lawmakers. It is true that the land is to be conveyed for a particular purpose, but for that purpose the legislature had said the county must have a *good title*. We cannot vary the force of the language used, to meet any case of supposed intention. The intention of the legislature is to be inferred from the language used, when that language is plain and explicit. In such cases, there is no room for construction. In *Waller* v. *Harris*, (20 *Wend.* 561,) Judge Bronson says: "The current of authorities at the present day is, in favor of rendering statutes according to the natural and most obvious import of the language." (*Fowler* v. *Convelt*, 9 *Verm. R.* 203. *Mathers* v. *May*, 13 *Mees. & Wels.* 511.) In the *Sussex Peerage case*, (11 *Clark & Fin.* 143,) Ch. J. Tindal says: 'The

only rule for the construction of acts of parliament is that they shall be construed according to the intent of the parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

The supervisors were not authorized to receive less than a good title under this act, and it would be a breach of duty and a violation of the trust committed to them as public officers, to take or accept a less estate than an estate in fee absolute. The county is to proceed and put valuable erections on this lot, and it would not be right in the supervisors to put these erections in peril, if the county should ever wish to change the location of the county buildings, or to restrict its power to do so, under such a penalty. It is true, that the consideration for this deed was, the location of the county buildings on the premises conveyed, but the act secured that result, and if the deed gave a good unincumbered title, the county could not do otherwise than locate on such lot and keep the land. The question, however, for us, is purely one for the construction of this deed, and I concur with my brother Strong that it does not convey a *good title;* and for the reasons assigned by him, I concur in his conclusion upon the whole motion.

WELLES, J. The 18th section of the act erecting the county of Schuyler (*Sess. Laws of* 1854, *p.* 913,) is in the following words, viz:

"Delos DeWolf, of the county of Oswego, Edward Dodd, of the county of Washington, Vivus W. Smith, of the county of Onondaga, shall be and are hereby appointed commissioners, whose duty it shall be, on or before the first day of June next. after the passage of this act, to examine and impartially determine and select a proper site or sites for the court house, jail and clerk's office, to be erected in said county of Schuyler; after such site or sites shall have been selected by them, or a majority of them, they shall immediately reduce such determination to

writing, giving a description of the lot or lots selected therein, affix their signatures thereto, and cause the same to be filed in the office of the clerk of the county of Chemung, and deliver a copy thereof to one or more of the commissioners in the next section of this act named. It shall be the duty of the commissioners in the next section named, forthwith to notify the owner or owners of such premises so selected, and in case a good, unincumbered title, free of charge or expense to the board of supervisors of the county of Schuyler, for the use of the people of the said county of Schuyler, for such premises, is made to the said county of Schuyler, and delivered within twenty days after such notice to the owner or owners as aforesaid, then such determination and location shall be final and conclusive. In case such title is not made as aforesaid, within the time aforesaid, the said first named commissioners in this section shall be notified of such failure, and proceedings shall again be taken by them to make another selection in the same manner as if no previous determination had been made."

Section 19 appoints five persons commissioners to superintend the erection and building of the court house, jail and clerk's office for the county, upon the site or sites designated and conveyed under the provisions of the preceding 18th section. In pursuance of the said 18th section, and within the time therein limited, the commissioners first named made a selection of a site for a court house, jail and clerk's office, reduced their determination to writing, affixed their signatures thereto, and caused the same to be filed according to the above directions of the act. Notice having been given to Charles Cook, the owner of the premises selected, he, within twenty days thereafter, by deed, bearing date the 9th day of June, 1854, conveyed the premises so selected to the supervisors of Schuyler county, which deed was duly delivered. This deed conveyed the premises to said supervisors, "for the use of the people of the county of Schuyler, as long as said lot or premises shall be and are occupied for a county site for the court house, jail and clerk's office, of said county of Schuyler; and when said lot or premises shall cease to be used for the purposes aforesaid, then the

same, with its appurtenances thereunto belonging, is to revert and belong to the said party of the first part, his heirs, executors, administrators or assigns, the same as if this conveyance had not been executed. The buildings now upon the above described lot or premises, are hereby reserved with the right to enter upon and remove the same, from the said lot or premises, whenever required so to do by the supervisors aforesaid, or the building commissioners," &c.

There appears to be no objection to this deed, except the provisions for a contingent reversion of the premises, and the reservation of the buildings, with the right to enter and remove them.

If the intention of the act was, that the owner of the premises to be selected, should convey to the board of supervisors a title in *fee simple absolute*, the deed of Cook was not a compliance with its provision. It becomes important, therefore, to inquire whether such is the true interpretation of the statute.

The object of the legislature was to secure, by a gratuitous conveyance from the owner, a site for the public buildings mentioned. The section recited, appoints commissioners to select a proper site or sites *for the court house, jail and clerk's office*, to be erected in the county of Schuyler, after such selection should be made, in case the owner or owners should, within twenty days after notice thereof, make and deliver to the county *a good, unincumbered title, for the use of the people of the said county of Schuyler*, the selection should be final and conclusive. It is impossible to discover any other object in these provisions than the one mentioned, viz, to provide for a permanent seat of justice, free of expense to the county. The plan was, to hold out an inducement to the owners of the premises selected to bestow the land, and in return, to locate the public buildings permanently upon it. It was for that and no other purpose the land was wanted by the county. The owner was to receive no compensation for parting with it, except the real or supposed advantages of such permanent location. The transaction was in the nature of an agreement between the legislature, acting in behalf of the county, and the owner of the land to be selected,

by which the former was to make the location, provided the latter would give the land for that purpose. It would seem to follow as a necessary consequence, that when the purpose of the grant should fail, the grant itself should cease. The location was, by the terms of the act, to be final and conclusive, and yet there was a possibility of a change. The legislature have the power to order the site abandoned, and a new one selected in another town or village, and that even before any buildings are erected upon the one first selected. If it were certain that the site would never be changed, the provision objected to would be, if not void, entirely nugatory and harmless; but inasmuch as a change is possible, and if ever made, the motive and inducement for the conveyance would be at end, it would be no more than just and equitable that the effect of the conveyance should terminate. It seems to me entirely clear that any other view is incompatible with that justice and fairness which we are bound to intend always governs and actuates the law-making power, and contrary to the plain sense of the language of the section under consideration.

The language of the statute is, that the title shall be made "*for the use of the people of the county of Schuyler.*" What use is here contemplated? Is it a general use, or the particular one for which the selection was required, in the same section, to be made? It is quite apparent that it was the latter, and no other. It was therefore proper that the deed should express the use as thus interpreted, and that the grant should be limited accordingly. The title to be made was to be "good" and "*unincumbered.*" It was to be good for the purposes intended and specified in the act; manifestly, nothing more was required. It was also to be "unincumbered." No incumbrance is alleged, excepting the limitation before considered, and if the construction I have adopted be correct, the limitation was, in no sense, an incumbrance. The good, unincumbered title required, was a title which would secure to the county the enjoyment of the premises as a site for its court house, jail and clerk's office, as long as it should be used for that purpose. The deed given by Cook secured such enjoyment, provided he was the legal owner

at the time he made the conveyance, and the land was no encumbered by mortgage or judgment. His title is not disputed, and there is no pretense of any such incumbrance.

As to the provision in the deed for a conditional reversion of the premises, it is sufficient to say, that it neither adds to, nor diminishes from, the legal effect which would attach to the grant, in case that provision had not been inserted, provided the preceding views in relation to the intent of the statute are correct. When a conveyance is to a particular use, the residue results in favor of the grantor. (2 *Fonb. Eq.* 2*d Eng. ed. p.* 132. 1 *id.* 439. 1 *Lomax Dig.* 200. 4 *Kent's Comm.* 5*th ed.* 300. 1 *Cruise's Dig.* 399, *tit.* 11, 20, 32, 34, 44.)

The reservation of the buildings is not inconsistent with the object and intent of the conveyance. It was a *site* for the county buildings—the land upon which to erect them, which the act contemplated, and not the buildings which might be standing upon it—which were capable of being removed, and which would have to be removed to make way for the new ones to be erected by the county.

It is contended on the part of the defendants, in addition to the objections growing out of the form of the conveyance of Cook to the supervisors, that the proceedings of the building commissioners were irregular and void, for the reasons that they did not give bonds with approved securities, as required by the 22d section of the act; and for the further reason that the supervisors have not fixed the amount the buildings should cost. It appears that the building commissioners, before they entered upon their duties as such, gave their bond to the board of supervisors, in pursuance of the 22d section, with good and sufficient sureties, who justified in the requisite amount. Notice was given to the supervisors to meet at Havana, on the 5th day of June, 1854, for the purpose of approving the bonds, but the board did not meet as requested. The bond was on that day presented to two of the supervisors, who, knowing the sureties, and being satisfied with them, accepted the bond, and so informed the building commissioners. That at the next ensuing meeting of the board of supervisors, one of the said members

of the board who had accepted the bond, presented to and left the said bond with the board, in whose possession it has since remained, without any action being taken thereon in reference to approving of the sureties or otherwise, and has never been returned or offered to be returned to the building commissioners. The sureties are shown to be amply sufficient, and no objection to their sufficiency has ever been made. The building commissioners have gone on and entered into a contract for building the court house, jail and clerk's office, and when this action was commenced, the court house and clerk's office were erected and completed upon the site selected by the commissioners, named in the 18th section as before stated, which have been accepted by the building commissioners.

The 22d section of the act provides that the building commissioners shall, "before they enter upon the duties of said office, give bonds, with approved sureties, to the supervisors of said county, for the faithful expenditure of the moneys committed to their charge for that purpose." The act does not provide in terms by whom the bonds must be approved; and assuming that the approval is to be by the board of supervisors, it must be deemed to have been done by them. No special act is indicated in the statute by which such approval shall be manifested. No indorsement upon the bond is required. It is sufficient if enough appears to show they were satisfied with its form and execution, and with the pecuniary ability of the sureties. After what has been done, it is, as it seems to me, too late for the board to say they have not approved of or are not satisfied with the bond in any of the respects mentioned. If they did not approve it, they should have said so, and given notice of their disapproval, or returned the bond. It is shown to be unobjectionable and it is now to be presumed it met their approbation in respect to its form, execution and sufficiency. The building commissioners have done all in their power to comply with the law in this respect. The objection itself is formal and technical, and arises out of the neglect, if not the contumacious conduct of the board of supervisors.

It is also objected on the part of the defendants, that the

building commissioners had no powers to contract until the board of supervisors had prescribed the amount to be expended in erecting the court house, jail and clerk's office.

The 20th section of the act authorizes and requires the board of supervisors to levy a sum, not exceeding $15,000, in such annual amounts as they shall deem most advisable, or they may loan for a term of years on the credit of the county the whole or a part of the money necessary for the purposes aforesaid. The 21st section authorizes the building commissioners to contract for the building, or with workmen, and purchase materials for building the court house, jail and clerk's office, and from time to time to draw on the treasurer of said county, for such sum or sums of money for the purposes aforesaid as should come into the treasury by virtue of the act. And the treasurer is thereby required, out of any such moneys, to pay upon the order of the building commissioners, or a majority of them, the several sums of money to be so drawn for. The remainder of the section requires the commissioners to account, when required, to the supervisors, for the money so received. This, with the 19th section, is all there is in the act touching the powers and duties of the building commissioners. It will be seen that they are not controlled in terms, at least as to the time when they were to commence the erection of the buildings, nor the amount they were to cost, excepting that the county was not to be charged with an amount exceeding $15,000, nor as to the size, plan, style or kind of materials to be used. They are expressly authorized, in general terms, to contract for the erection of the buildings, or with workmen, and to purchase materials. I entertain no doubt that a contract made by the commissioners for the erection of the buildings, or for labor or building materials, before any action by the supervisors in relation to the amount to be raised from the county, would be valid and binding upon the commissioners. If they exceeded the powers conferred upon them by the act, they would be personally liable to make good their contracts. But any money levied by the supervisors for the erection of the buildings under the act would be applicable and sub-

ject to the drafts of the commissioners. The supervisors have not the power to say what the buildings shall cost. It may be they have a discretion to say they shall not *cost the county* beyond a certain amount, by them to be determined, not exceeding $15,000. And yet I think it might be argued with much plausibility, that the commissioners are authorized to go on and erect the buildings, when, and in such manner and at such cost, not exceeding the sum mentioned, as they shall deem advisable: and that it was the duty of the supervisors to levy or borrow a sufficient amount to meet the expenses thus incurred, and that their discretion was restricted to the proportions to be annually levied, and as to whether they should borrow the whole or any part. However that may be, whatever amount should be raised from, or upon the credit of the county, would, as before remarked, be subject to the drafts of the building commissioners. The sum of $3000 has been levied upon the county towards payment for the erection of a court house, jail and clerk's office, of the county, and drafts have been made for it, by the building commissioners, in favor of the plaintiffs, who erected the court house and clerk's office under contract with the commissioners. The plaintiffs have thus acquired a vested right to this money, which the supervisors and the defendants are seeking and attempting, or threatening, to divert to another and totally illegal purpose.

The question of parties is not now considered, as it does not, in my judgment, belong to this occasion.

It cannot, with propriety, be contended that the questions which I have considered are so clearly with the defendants as to justify the court in dissolving the injunction order, before the final hearing. None but the plaintiffs are entitled to the $3000, as no one has the right to draw it but these building commissioners. That the supervisors had no right to appropriate it towards paying for the building at Watkins, seems to me too plain to admit of an argument.

The injunction should, at least, be retained until the final hearing, so that the plaintiffs, if the decision shall then be adverse to them, would be in a condition to present the question

to the court of dernier resort; which they could not do by appeal from any decision made on this appeal.

Order appealed from reversed, with $10 costs, and injunction order vacated.

[Monroe General Term, September 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

23 390
41k 142
18a 442

Hunt *vs.* The City of Utica.

It is a familiar principle that where, in an instrument between parties contracting with each other, a reference is made to another which contains conditions and qualifications in regard to the subject matter about which they are contracting, the latter shall be deemed incorporated with the former, and be taken as a part of the contract between the parties.

A reference to the provisions of a statute pertaining to, and regulating, the subject, in respect to which a party is about to contract, comes within the same principle. It is as if the law were written in, and formed an integral part of, the contract which the parties have undertaken to enter into. It interprets its provisions, and is equally binding upon both.

Thus, where the corporation of Utica commenced proceedings for the grading of a street, under the 66th section of its charter, and published the notice of application and a plan and specifications of the work, stating therein that "the expense thereof was to be assessed pursuant to the 66th section of the city charter," &c.; and in the proposal which the contractor made he offered to do the work upon certain specified terms, "according to plans and specifications thereof, on file with the city clerk;" and in accepting the proposal the common council stated that the expenses "are to be assessed pursuant to the 66th section of the charter," and again, in finally auditing and allowing the contractor's account, they added that it was "payable when collected by assessment;" *Held* that these proceedings and documents constituted the contract between the parties, and that no action would lie against the corporation, in favor of the contractor, until the assessment had been collected; it being shown that the corporation had done its duty in making an assessment, and in taking the necessary measures for its collection.

APPEAL by the defendant from a judgment entered upon the verdict of a jury. The action was brought by the plaintiff, as assignee of Christian Cossleman, to recover for work, labor

and services done and performed by said Cossleman, in and about the paving and grading a portion of Genesee street, in the city of Utica, and making cross-walks on the same, and for materials furnished and used in and about said work. The answer was a general denial of the complaint, and also set up the defense that the assignor Cossleman contracted to do and perform such work, labor and services, and to furnish such materials, and to receive his compensation therefor out of an assessment to be made upon the lots or parcels of land upon Genesee street and adjoining, and benefited by such improvement, and when the same should be by law collected; and that this action was commenced before said assessment could be collected by due course of law. The answer also set up, as a set-off, the amount assessed upon the lot owned by the plaintiff. The reply was a general denial of the answer, and further alleged that the defendant had no right to make such assessment upon the plaintiff's lot The cause was tried at the Oneida circuit, in March, 1856, before Mr. Justice PRATT. On the trial the various proceedings before the common council, for putting the work in question under contract, the acceptance of Cossleman's proposals, and the doing of the work by him were proved. It was also proved that after the work was completed, Cossleman presented to the common council his bill therefor, amounting to the sum of $6640.59, which was referred to the committee on paving, and that the committee made a verbal report in favor of allowing the account, "*payable when collected by assessment*;" which report was concurred in by the common council. The plaintiff read in evidence an assignment of the demand, from Cossleman to him, dated November 21, 1855. It was also proved that an assessment had been made, upon the property benefited by the improvement, to pay the expenses thereof, and that a resolution was adopted, on the 16th of November, 1855, directing the treasurer to "take the necessary measures for the collection of said assessment, as provided in sections 66 and 69 of the city charter." Two copies of the assessment list were made and signed by the mayor and clerk, the one of which was filed with the city clerk and the other with the city treasurer, on the 10th of December,

1855. It was admitted that the plaintiff, during 1855, owned and still owns and occupies the lot of land fronting on the part of the street paved by Cossleman, which is described and marked on the assessment list as the plaintiff's, and assessed thereon to the amount of $516.18. It was further admitted that the treasurer of the city of Utica, about the 1st of February, 1856, the parties assessed having neglected and refused to pay the assessment or any part of them, issued a warrant to the collector of Utica, to collect the said several assessments, and that said warrant was not returnable, and had not been returned to the treasurer, but was in the hands of the collector at the time of the trial; and that no part of the said assessment had been paid to the treasurer, or collected by the officers charged with the collection thereof by law. It was further admitted that this suit was commenced on the 26th of January, 1856; and that the city of Utica had no money or funds at any time after the work in question was completed, exceeding a few hundred dollars. It was also admitted that the plaintiff had not paid the amount assessed to him as aforesaid, or any part thereof. The plaintiff proved that the interest on the amount of the account for paving from the 16th of November, 1855, to the trial, was $168.97.

The counsel for the defendants insisted that the plaintiff was not entitled to recover against the defendant, and that the court should nonsuit the plaintiff or dismiss the plaintiff's complaint, or order a verdict in favor of the defendant on the following grounds: 1st. That on the facts proved, the defendant was not liable in this action for the services of Cossleman in paving the street in question, or for the demand sought to be recovered. 2d. That the defendant did not contract or agree with Cossleman to pay for the work on its completion or at any time; that the legal effect of the action of the common council, and the proposition for a performance of the work by Cossleman, was that the common council should cause the expense of performing the work to be assessed upon the property fronting on the street, and to be collected pursuant to the charter of the defendant and paid over to him. That this action was not brought for any omission of the defendant or its common council to perform this

duty, and that the action was brought before the assessment was or could be collected, and while the proceedings to enforce the same were being prosecuted. 3d. That the defendant did not contract or agree with the plaintiff to pay for the work, and was not liable therefor when this action was commenced. 4th. That this action was prematurely brought; that when it was commenced the defendant was not liable to pay for the work. 5th. That by the contract or agreement between the common council and Cossleman, the expense of the work was to be assessed and collected out of the property fronting on the street paved, and Cossleman paid therefor out of the funds so raised when collected, and not before, and that this action was brought before such assessment was collected. 6th. The common council had not power or authority to bind or obligate the defendant to pay for the paving of the street in question absolutely. That the common council had only power or authority to cause the same to be paved, and the expense thereof assessed, collected and paid over to the party performing the work in the manner prescribed by its charter, and that this the common council were proceeding to do when this suit was commenced. 7th. That neither the defendant nor its common council or officers had power or authority to contract for paving the street, or to agree to pay for paving the same, and that neither had any power or authority as to paving the same, except to direct it to be done, and the expense to be assessed, collected and paid for as prescribed in its charter. 8th. That the work was not performed or completed by Cossleman, according to his contract; that it was not completed by the 15th of September, nor until about the 1st of November. 9th. That the said performance of the work by Cossleman by the time prescribed, was not waived. That when the common council allowed his account, it was expressly on condition that it should not be paid till the assessment for the work was collected, and out of such assessment. The court overruled each of said objections, refused to nonsuit the plaintiff, or dismiss his complaint, and ruled and decided that the plaintiff was entitled to recover the amount of Cossleman's account for paving the street; to which refusal to nonsuit the plaintiff or dismiss his complaint, and to

the overruling of each of said objections, the counsel for the defendant excepted; also to the ruling and decision of the court, that the plaintiff was entitled to recover in this action the amount of said Cossleman's account for paving said street. The counsel for the defendant further offered and requested the court to allow the said amount of $516.18, assessed to and upon the lot of the plaintiff fronting on the said street, so paved by said Cossleman, to be set off against so much of the plaintiff's demand. To this the counsel for the plaintiff objected, and the court excluded the same, and decided that the defendant was not entitled to have the said amount or any part thereof set off or allowed against the demand of the plaintiff herein. To which decision the counsel for the defendant also excepted.

Thereupon the court ordered and directed the jury to return a verdict in favor of the plaintiff for his demand, to the amount of $6640.59, and interest thereon from Nov. 16th, being $168.97.

Ward Hunt, plaintiff, in person.

F. Kernan, for the defendant.

Bacon, J. The defendant in this case is a municipal corporation, deriving all its powers from, and exercising its functions in accordance with, the charter which constitutes its organic and fundamental law. The principle is too familiar and elementary to require the citation of authority in its support, (although the books abound with cases which establish the doctrine,) that such a corporation possesses and can exercise no powers except such as are expressly granted by its charter, or such as are necessary to carry into effect the granted powers.

The agency through which the corporation mainly acts, is the common council of the city, a body constituted by the charter, and having certain specific duties cast upon, as well as restraints thrown around it. It is an obvious result of this organization, that the municipal body, which is the corporation, can only be bound or affected where the common council, the subordinate agency through which it ordinarily acts, exercises authority in conformity with the law of its creation, and never can be bound

in any case where the council acts in violation of any restriction which the organic act imposes upon it.

It is perhaps a common, but is nevertheless a very manifest error, to suppose that the common council of a city is a sort of independent body, having, to some extent, inherent executive as well as legislative powers, not entirely subordinate to the law which creates and limits their authority, and consequently, that they, to some undefined extent, are "a law unto themselves" as well as to those with whom they are dealing. Such a doctrine has no support from principle or authority. If a corporation, when prosecuted for an act of its agents, (the common council for the time being, of a city,) are to be met by such a plea, the doctrine of estoppel will have reached an extent little dreamed of heretofore, and there would be no conceivable stretch of power on the part of that body for which the corporation would not be held responsible. On the contrary, the true principle, as stated by Nelson, J., in *Cuyler* v. *Trustees of Rochester* (12 *Wend.* 168,) is that "the charter prescribes the powers of the trustees, beyond which they cannot go. If they do, they act as individuals, and not in the character of trustees, and their proceedings, of course, are inoperative and void." In suits against corporations of a municipal character, they, like all other principals, may defend themselves on the ground that the act by which they are sought to be made responsible, was an act done without their authority. The same doctrine is upheld and enforced in the judgment in the court of appeals, in *Mayor of Albany* v. *Cunliff*, (2 *Comst.* 178,) where it is held that the assent of the common council to an act beyond their authority, can never estop the corporation from raising the objection. The officers act for their principals, and are of course limited, in their legitimate action, to the powers conferred by the charter creating them. If the council cannot bind the corporation expressly, they cannot conclude them by way of estoppel. "This rule," says the court, "although it may sometimes operate harshly, is a safe and sound one, and should be applied uniformly to all persons acting in a representative capacity, where they travel beyond their legitimate powers."

Bearing these principles in mind, it is important to inquire what powers are given to the common council of Utica by the charter of the city, in respect to the work for the execution of which the claim in this suit arises, and also what control the council are permitted to exercise over the finances of the corporation. Upon this branch of the inquiry it will be seen, by the various provisions of the act incorporating the city, and the amendments thereto, that the charter proceeds upon the idea of separating the finances of the city into distinct funds, each having its specific office to perform, and so segregating them that one shall in no contingency be blended with or merged in the other. Thus by sections 40 and 41 of the act to amend and consolidate the several acts relating to the city of Utica, (*Laws of* 1849, *p.* 249,) the council are empowered to raise, by a general tax upon all the taxable inhabitants of the city, a specific amount, and the objects to which the same is to be de voted are enumerated in the section. These objects are all of a general and public nature, in which all the inhabitants are supposed to have a common interest, and to which all are bound to contribute, in proportion to their means and their liability to taxation. In respect to these as to other funds of the corporation, the treasurer is required to keep an accurate account of all receipts and expenditures, so as to exhibit the amount paid under each particular class of purposes for which money shall be raised. This fund, therefore, never can be rightfully diverted from, or appropriated to, any other objects than those specifically enumerated in the charter. (*See* § 21.) But in respect to local improvements, such as paving streets, making side walks, &c., which are necessarily limited to particular localities and which are for the special benefit of those in the immediate vicinity thereof, inasmuch as they derive the chief advantage, upon them and their property, which is supposed to be enhanced by the improvement, is cast the burden; and this class falls within other provisions of the act, and is fully provided for in another title and by a distinct section of the act. By section 66, the power is given to the council to cause any street in the city to be graded, leveled, paved or repaved, &c. The manner

in which the council is to proceed is minutely pointed out in the remainder of the section, and to provide the necessary funds to defray the expense of such improvements, it is expressly provided that the same shall be assessed upon each foot front of the lots upon both sides of the street which has been thus improved. By the 70th section, all moneys received upon these assessments are to be kept by the treasurer as a distinct fund, and these moneys are to be drawn only by orders expressly directing their application to the expense for which the assessment was made. And by the next section (§ 71) no moneys belonging to the city (and which constitute its general, in contradistinction from its specific funds,) shall be paid out by the treasurer, upon orders drawn against moneys to be raised upon an assessment. And as an additional safeguard and restraint upon the council, they are by a subsequent section prohibited from contracting any obligation or borrowing any money, except for the purpose of anticipating for a short period the collection of the ordinary tax of the current year. (*See* § 99.) It will thus be seen that not only has a precise and definite provision been made for this very case, but the most solicitous and industrious care has been used to provide a specific fund, and to guard the other funds of the city from being encroached upon by appropriations for a foreign and improper object.

It follows, therefore, that the council, if they had attempted it, had no power whatever to bind the city to pay for the work in question in this case, out of the ordinary revenue of the city, or forthwith upon its completion. All the duty that rested upon the common council, and I may add, all the power they possessed, was to cause the expense of the work to be assessed and means taken for its collection in the manner provided by the charter, and to apply the money, when received, to the payment of the contractor. There is no pretense that this duty has not been performed, with all requisite promptness and fidelity. Immediately upon the completion of the improvement, which was in November, 1855 the amount due for the work was certified by the city surveyor, presented to the council, referred to the appropriate committee, who, at

the next meeting of the council, reported in favor thereof, and allowed the account, payable when collected by assessment. The whole expense of the work, including the assessment, was then ascertained and an assessment list prepared and filed with the treasurer, on the 10th of December thereafter, and no voluntary payments having been made by the parties assessed, the treasurer issued his warrant for the collection of the tax, in February, and the same was in the hands of the collector, unreturned and unreturnable when the suit was commenced. This shows a case of due diligence on the part of the council in attempting to fulfill the duty enjoined upon them by the charter. If they had unreasonably neglected or refused to make the assessment, or take the necessary steps for the collection of the tax, or refused to pay over the money when collected, an action on the case might be sustained against them, and very probably by a mandamus the city could be compelled to take the appropriate measures for raising the money and discharging the indebtedness. (*See McCullough* v. *Mayor &c. of Brooklyn*, 23 *Wend.* 458.) No other duty, it is said in this case, (which in its features is strikingly analogous to the one at the bar,) rests upon the corporation than that of putting the necessary machinery in motion, according to the requirements of the statute. (*See also Lake* v. *Trustees of Williamsburgh*, 4 *Denio*, 520.)

The only authority which has been invoked in opposition to these conclusions is the case of *Cumming* v. *Mayor &c. of Brooklyn*, (11 *Paige*, 596.) As I understand that case, it contains no doctrine which will enable the plaintiff to recover upon the case made by him. Without stopping to remark upon the important consideration that the charter of Brooklyn (*Laws of* 1834, *p.* 90, *et seq.*) contains no such special provisions as does the charter of Utica, in regard to the collection, keeping and disbursement of specific funds, and restraints upon the power of the council to order payments to be made therefrom, it is sufficient to say that the decision was put upon the express ground of a breach of duty on the part of the council, in not taking the necessary steps to cause a legal assessment

to be promptly made and collected. This duty they not only unreasonably delayed, but in attempting to execute it performed the office in such a loose and perfunctory manner that the assessment wholly failed to reimburse the claimant. In deciding the case, the chancellor says: "The fair construction of the contract is that the plaintiffs shall be paid for their labor *when the assessment shall be made and collected*, and that the corporation shall cause such assessment to be made and collected without unreasonable delay. As the corporation had violated their contract by not having a proper assessment made without unnecessary delay, the plaintiffs were entitled to a decree against the defendants for the payment of the amount due." Upon no other principle can the decision be upheld, and if it attempts to establish any thing beyond this, it is not the law of the land as applicable to this case. No such breach of duty existed, or is alleged, on the part of the defendant, and without it no liability whatever attaches to the corporation.

This view is decisive of this cause, and if my conclusions are sound, shows that upon the allegations and proofs in this action the plaintiff cannot recover. But I think it equally clear, that in this case the council never undertook to transcend their power, and have made no contract or engagement by which the corporation were bound to pay the contractor absolutely upon the completion of the work, or out of general funds belonging to the city. By looking at the evidence as it is spread out on the record, it will be seen that the council commenced the contemplated improvement under the 66th section of the charter, and have proceeded throughout in accordance with its provisions. They published proposals and a plan of the work, which had been filed with the city clerk, containing all the specifications required, and stated therein explicitly, that "the expense thereof was to be assessed pursuant to the 66th section of the city charter, and the acts amending the same." In the proposal which the contractor made, he offered to do the work upon certain specified terms, "according to plans and specifications thereof, on file with the city clerk." In accepting the proposal and directing the work to be done, which the

council did, by an ordinance duly passed, they again state, in the resolution and order, that the expenses are "to be assessed pursuant to the 66th section," &c., and in finally auditing and ascertaining the amount of the account, they add that it is "payable when collected by assessment." These proceedings and documents constitute the contract between the parties, and it seems to me quite clear, that taken together, they show conclusively that the work was undertaken and prosecuted to completion under engagements in strict conformity with the charter on one side, and a full understanding and acquiescence therein on the other. It is a familiar principle, that where, in an instrument between parties contracting with each other, a reference is made to another which contains conditions and qualifications in regard to the subject matter about which they are contracting, the latter shall be deemed incorporated with the former, and be taken as a part of the contract between the parties. A reference to a provision in a statute pertaining to and regulating the subject, in respect to which a party is about to contract, comes within the same principle. It is as if the law were written in and formed an integral part of the contract which the parties have undertaken to enter into; it interprets its provisions, and is equally binding upon both. This being so, and conceding, as we must, upon this case, that the defendant has performed the whole duty which the charter imposes upon the council, both in respect to the prompt assessment of the tax, and the necessary measures to insure its collection, no right of action whatever exists against the corporation.

I should deeply regret the necessity of arriving at the conclusion to which this discussion has conducted me, were the result to be the loss to the contractor in this case, or his assignee, of the hard earned compensation to which he is justly entitled. That consequence, however, will by no means follow. The council have performed their duty by levying the tax and putting in motion the proper machinery to ensure its collection. There is indeed an allegation in the complaint to the effect that the improvement is one the common council had no

right to order, and that they had no authority to assess or collect the expenses of the work. If there had been any proof offered to sustain this allegation, the consequences might have been as fatal to the plaintiff's right of action, as the pleader must have assumed it would be to the defense. But it is sufficient that no evidence was given upon the trial upon this branch of the case, and we must assume, therefore, that the necessary funds will be ultimately raised through the assessment which has been made and ordered to be collected. If, however, there shall be found to be any legal impediments to raising the tax through the means now in operation, the city should in that event assume the burden, and by means of an extraordinary tax, for which the charter has made ample provision, or by a direct act of legislation, power must be obtained to raise the necessary funds. To this no fair minded citizen can object, if the assessment cannot be rightfully collected of the parties upon whom it has been imposed, or adequate means are not derived therefrom to pay a just debt, incurred in good faith, and equitably binding upon the city.

The judgment must be reversed and a new trial ordered, with costs to abide the event.

PRATT, J., and W. F. ALLEN, J., dissented to the proposition first discussed in the above opinion, but concurred in the result, upon the ground stated in the second proposition.

Judgment reversed.

[ONONDAGA GENERAL TERM, October 6, 1856. *Pratt, Bacon* and *W. F. Allen*, Justices.]

33 402
20a 147

JOHN LANNING *vs.* JOHN CARPENTER.

BENJAMIN CARPENTER, RICE TOMPKINS and BENSON SMITH *vs.* THE SAME.

BENJAMIN CARPENTER and RICE TOMPKINS *vs.* THE SAME.

BENJAMIN CARPENTER and BENSON SMITH *vs.* THE SAME.

Although no adjudication in fact, by the court, nor the agency of any judge of the court, is required to warrant, or in entering, a judgment by confession without action, under the code, yet the judgment has all the qualities, incidents and attributes of other judgments. The entry of such judgment requires the exercise of the jurisdiction of the court, and when entered the judgment is by law a judicial act of the court, recorded by its clerk.

Hence the provisions of § 384 of the code, relative to the entry of judgments by confession, are only applicable to county organizations which are complete, as to the jurisdiction of the court, as well as for other purposes; in which, as such, the court may pronounce judgment, and has a clerk to enter its judgments.

Where the organization does not exist, as to such jurisdiction, no judgment of the court can be entered which depends in any way upon that organization for its validity; nor can a county clerk be *ex officio* clerk of the supreme court, in a county which is not organized as to such court.

Accordingly *held* that a judgment in the supreme court, by confession, entered in the clerk's office of the county of Schuyler, prior to the census mentioned in the act erecting that county, and consequently before the county had any legal existence in respect to the jurisdiction of that court, was null and void; and it was set aside, on motion. WELLES, J., dissented.

JUDGMENTS were entered and docketed in the above entitled causes by confession, without action, as follows: In the first cause, in the clerk's office of Schuyler county, on the 14th day of July, 1855, for $1450, and $5 costs. In the second cause, in the same clerk's office, July 16th, 1855, for $3500, and $5 costs. In the third cause, in the clerk's office of the county of Steuben, on the 19th day of December, 1855, for $1500, and $5 costs. In the fourth cause, in the same clerk's office, for the like sum as in the third cause.

In the first cause, the statement in writing by virtue of which the judgment was entered, after stating the amount for which the judgment might be entered, and authorizing the entry of

judgment therefor, contained the following further statement, viz: "This confession is for indebtedness from me to the said Lanning, arising out of the following facts, viz: on one promissory note given by me to the said Lanning, on the 8th day of December, 1854, for one hundred dollars borrowed money, on which is endorsed eleven dollars and sixty cents, said note due when given. Also, one promissory note of three hundred and forty dollars, made by me and dated October 17, 1854, due when given, and now owned by the said Lanning, the same being given for borrowed money. Also for the said Lanning assuming the payment of the sum of one thousand dollars at the Bank of Havana, on the 14th day of July, 1855, by which a note of one thousand dollars, made by me to the order of Samuel Carpenter at the said Havana bank, dated on the 31st day of May, 1855, and indorsed by the said Samuel Carpenter and D. J. Sunderlin, was paid and taken up. Dated July 14, 1855." (Signed) John Carpenter. This statement was duly verified by the oath of the defendant.

Executions having been issued upon all the judgments, a motion was made at the special term held in the county of Ontario, on the first Monday in April, 1856, on behalf of the plaintiffs in the last three causes, to set aside the judgment and execution in the first cause; which motion, after the same was argued, was, in view of the importance of the questions involved, referred to the general term. The motion was brought on and argued before the general term held in the county of Cayuga, on the first Monday of June, 1856. The case was held under advisement by the general term until the December term thereof, held in the county of Monroe, when the motion was granted, and the following opinions were delivered.

R. Campbell, for the plaintiffs in the last three causes.

D. J. Sunderlin, for the plaintiff in the first cause.

T. R. Strong, J. The county of Schuyler, at the time of the entry of the judgment in the first case, had no legal exist

ence in respect to the jurisdiction of this court. The act to erect that county provides that for all purposes, except, among others, the jurisdiction of the supreme court, the territory particularly specified in it shall from and after the passage of the act, until after the next state census or enumeration, and thereafter for all purposes, be a separate and distinct county. (*Laws of* 1854, *p.* 913, § 6.) The judgment was entered prior to the census, and of course when the act as to the jurisdiction of this court was as though it had not been passed. If, therefore, the entry of the judgment required the exercise of the jurisdiction of the court, the judgment could not legally be entered in that county. So far as that jurisdiction was concerned, the judgment might as well have been entered in form in the office of a town clerk, or any private person.

The judgment in question was entered under the provisions of the code relating to the confession of judgments without action. (*Code*, §§ 382, 383, 384.) The mode prescribed by those provisions for entering a judgment by confession, is, that a statement in writing to the effect particularly specified in § 383, must be made, signed by the defendant, and verified by his oath. That statement, by § 384, may be filed with a county clerk, who shall indorse upon it and enter in the judgment book, a judgment of the supreme court for the amount confessed, with $5 costs, together with disbursements. The statement and affidavit, with the judgment indorsed, by the same section, constitute the judgment roll, and executions on the judgment may be issued and enforced in the same manner as upon judgments in other cases in this court. No adjudication in fact by the court, nor the agency of any judge of the court, is required to warrant, or in entering the judgment. The legislature have prescribed the judgment, and directed the clerk to enter it. But the judgment is, by the express terms of § 384, a judgment of this court. It has manifestly all the qualities, incidents and attributes of other judgments, and is to be proceeded with, and upon, in like manner. It does not differ from any other judgment except in the mode of obtaining it. The court has full control over it as to amendments, and in all other respects

as in the case of its other judgments. I do not perceive why such a judgment does not occupy the same footing, and is not in like manner, in legal contemplation and effect, a judicial final determination of the court in the exercise of its jurisdiction, as judgments on failure to answer under subdivision 1 of § 246 of the code. Judgments, under that subdivision, are entered by the agency of the plaintiff, and the clerk of the court, without any act otherwise of the court; and yet no one can doubt that such judgments are, in a legal view, the judicial action of the court in the performance of its functions.

By our present judicial system, the clerks of the several counties of the state are clerks of the supreme court; (*Const. art.* 6, § 19;) and, as such, each is to keep among the records of the court, a book for the entry of judgments, to be called the judgment book, in which the judgments of the court are to be entered. (*Code*, § 279.) Although it is not expressly declared that the duties to be performed by the county clerk in entering judgments by confession, are to be done by him as clerk of this court, it is obvious that they are required of him in that character, and as having, in that capacity, the judgment book in which the judgments are to be entered, and other records of the court. The clerk, as a ministerial officer of the court, in obedience to the law, which specifically prescribes the judgment, and dispenses with a special application to the court in such cases, enters the judgment of the court. The judgment is, by law, a judicial act of the court, recorded by its clerk. It seems to follow, that the provisions of § 384, as to the entry of judgments by confession, are only applicable to county organizations which are complete as to the jurisdiction of the court, as well as for other purposes; in which, as such, the court may pronounce judgment, and has a clerk to enter its judgments. Where the organization does not exist as to such jurisdiction, it is not easy to see how a judgment of the court can be entered which depends in any way upon that organization for its validity; nor is it plain, how a county clerk can be *ex officio* a clerk of the supreme court, in a county which is not organized as to such court. And how could an execution, which is

process of the court, depending upon its jurisdiction for vitality, be directed to the sheriff of a county which cannot be recognized by the court for the purpose of its jurisdiction.

The defect in the judgment in question, is not, that the court has not jurisdiction over the territory in the county of Schuyler, but that such jurisdiction can only be exercised under the county organizations which existed prior to the attempt to erect that county.

There are cogent reasons, relating to the validity of the act to erect the county of Schuyler, why it should not affect the jurisdiction of this court as it before existed, but as the act does not purport to do so, they need not be stated.

In my opinion the judgment could not be legally entered independent of the aid of the jurisdiction of this court; and for the foregoing reasons it is a nullity.

The motion to set aside the judgment and subsequent proceedings, must therefore be granted, with $10 costs.

E. Darwin Smith, J. This motion was first made before me at the Steuben circuit, in January, 1856, when I declined to decide it, chiefly on the ground that it was doubtful whether my decision could in any way be reviewed.

The question of the validity of this judgment came before me again at special term in that county, on a motion to dissolve an injunction founded on the judgment; which motion I granted, and wrote thereupon the brief opinion which may be found in 12 *Howard*, 191, which opinion was prepared chiefly with the view to draw the attention of the public to the difficulties in the case, that they might be obviated during the sitting of the legislature then in session. The legislature having unfortunately adjourned without making any provision in respect to the exercise of the jurisdiction of this court in that county, the difficulties remain, and this motion being here renewed, we are obliged to decide it. As my brother Welles has come to conclusions upon the motion in which I cannot concur, and I am ignorant of the views of my brother Strong on the question, I have deemed it due to the importance of the case and the part I am called upon to take in its decision, to state the reasons for the conclusions to which I

have come, more fully than they are contained in the brief opinion above referred to in *Howard*.

In proceeding to erect the new county of Schuyler the legislature was embarrassed, among other difficulties, with the several provisions of the constitution providing for the organization of judicial, senatorial and assembly districts. The territory proposed to be organized into the new county was embraced in two judicial, two senatorial, and at least three assembly districts. These districts are unalterable by the legislature till after the next decennial state census. (*Const. art.* 3, § 485; *art.* 6, § 16.) To obviate this difficulty, which was insuperable, so far as the immediate erection of the new county was concerned, the sixth section of the act, after the territory to compose the new county had been described, declared that such territory, from and after the passage of such act, should for all purposes "except the election of members of the legislature and justices of the supreme court and for the holding and jurisdiction of the supreme and circuit courts and courts of oyer and terminer, until after the next state census or enumeration, and thereafter for all purposes whatever, be a separate and distinct county of the state of New York, by the name of Schuyler." This exception is in, and is part and parcel of, the enacting clause, and is obviously essential to the validity of the act. Without it the act would have been clearly and palpably unconstitutional. Such being the necessity for the exception, it obviously restrained the act from having any force or effect whatever within its legitimate scope. So far as relates to this court and courts of oyer and terminer, and the election of members of the assembly and of the senate, the act has no force or validity as a *law*: it is utterly null and void and inoperative; else the exception will not have accomplished its purpose of saving the act from the imputation of palpable unconstitutionality. This being so, the whole territory embraced within the limits of the proposed county of Schuyler remains, so far as relates to this court and to the election of senators and members of assembly, as before, part of the original counties of Tompkins, Chemung and Steuben, *precisely as if this act had never passed*

If this act had never been passed, the jurisdiction of this court in all its departments would of course have been exercised over the people within the limits of the proposed county of Schuyler, or in the counties of which they are a part, in and through the ordinary officers and modes of judicial administration. It must be so still; or else this act has some force in conflict with the ordinary rights and privileges and immunities of the people of that territory in respect to this court. So far as it invades any of such rights, privileges and immunities, if it does so at all, or affects them, it is unconstitutional and null—no act or law. This is patent on the face of the bill, and is confessed by force of the very exception in question. This view, it seems to me, conclusively disposes of the questions presented on this motion; for if the judgment sought to be set aside is a valid judgment of this court, the exception aforesaid is utterly abortive. This court acts through officers. A clerk and sheriff are legitimate officers of the court, essential to its action and included within the ordinary agencies or machinery for the exercise of its powers and jurisdiction. Sheriffs and clerks are constitutional officers. (*Const. art.* 10, § 1.) Clerks of counties are clerks of this court. (*Const. art.* 6, § 19.) Within the limits of these respective counties, sheriffs and clerks are the exclusive officers for the exercise of their particular functions, and are entitled to all and singular the fees and perquisites pertaining to their respective offices. The incongruity of two sets of officers of the same name and title and exercising the same precise functions, must be in conflict with the constitution. One set of such officers must be without lawful authority, and mere usurpers. The sheriffs and clerks of the respective counties are entitled to the full and complete enjoyment of all the privileges, rights and franchises pertaining to their offices, of which they cannot be deprived by the legislature, except by a constitutional act creating a new county. It follows, that before the sheriff and clerk of Schuyler county can lawfully take the fees and perquisites which pertained to the sheriff and clerk of Tompkins, Chemung and Steuben counties, they must be full constitutional officers. It is unnecessary to maintain that the

sheriff and clerk of Schuyler county, elected in pursuance of the provisions of said act, are not for the same purposes legal officers. If the act is constitutional, aside from the question presented upon the exception, in respect to this court and the election of senators and members of assembly aforesaid, as is held in *De Camp* v. *Eveland*, (19 *Barb.* 81,) that does not affect the question presented on this application. Upon the assumption that there is a lawful county clerk in Schuyler county for some purposes, the question recurs, whether the powers claimed for such clerk and exercised by him in entering up and docketing the judgment sought to be set aside by this motion, pertained to "the jurisdiction of this court." It is claimed by the counsel for Lanning, and the argument is concurred in by my brother WELLES, that the act of perfecting the judgment in question was not an act done and performed by him as a clerk of this court, but was done under the express authority of the statute, and that the judgment is a mere statute judgment. Whether the legislature can authorize a person not a lawful clerk of some county in the state to enter up and perfect a judgment in, or of this court, is a question that does not arise. The point is, has the legislature done or attempted to do any such thing? I think it has not. Section 279 of the code is as follows: "The clerk shall keep among *the records of the court*, a book for the entry of judgments, to be called a judgment book." To confess a judgment, a defendant must make a statement in writing and verify it, pursuant to section 383. This statement is to be filed with a county clerk, who shall indorse upon it and enter in the *judgment book* a judgment of the supreme court for the amount confessed, with $5 costs, together with the disbursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment roll. All judgments of this court are to be entered in this judgment book. (§ 280.) And on filing the judgment roll the clerk is to docket the judgment. This is done in another book kept by the clerk as clerk of this court, in which all judgments are entered before they become liens. (*Rule* 4, *S. Ct.*) Section 466 of the code declares that the word clerk, as used in

the act, signifies the clerk of the court where the action is pending, and in the supreme court the *clerk of the county mentioned in the title to the complaint.* The title of the county mentioned in the statement and affidavit on which these judgments were entered up, was *Schuyler county.* No *complaint* can be so entitled, for no venue in this court can be laid in that county. How then can any such *clerk* receive and file such statement and docket a judgment in this court? The venue is essential to designate the place of trial and the clerk's office where the proceedings are to be filed. A fee of fifty cents is allowed to the clerk for entering a judgment. (§ 312 *of the Code.*)

The clerk is to adjust the costs, and in a case like this, in addition to the $5 costs allowed by section 384, he must pass upon the disbursements to be allowed the plaintiff. (§ 311.) This is in the nature of a judicial act to be performed by the clerk, as clerk of this court. (*Supervisors of Onondaga* v. *Briggs*, 2 *Denio*, 26.) All the acts authorized by any provision of the code to be done by the clerk of the county, as above stated, and elsewhere, relate to his character as *clerk of this court;* all pertain to him as *an officer of this court*, and not otherwise. If this judgment is regularly docketed in Schuyler county, it is a lien upon the real estate of the defendants in that county. (§ 282.) Executions are to issue, following the judgment, to the same counties as upon other judgments of this court. (§ 384.) There can be no doubt, I think, that the execution is process of this court, and under its control, like all other process. If the clerk of Schuyler county can docket a judgment in that county, I can see no reason why the plaintiff may not issue execution thereon to the sheriff of that county, and why the sheriff is not equally a legal and constitutional officer of this court to enforce and collect such execution. If this can be done, I cannot see why the clerk and sheriff are not full officers, for all intents and purposes within this county, the one to enter up and docket any judgment, and the other to collect any execution to him delivered in or out of this court. If the sheriff can execute one execution as sheriff, he can execute all executions, and must do so

exclusively within the limits of his county. If he cannot do this, he cannot do any act as sheriff in the service of the process of this court; for he is either sheriff or not sheriff. I cannot agree that he may, for the enforcement of the process of this court, execute the office of sheriff concurrently with the sheriffs of Steuben, Chemung and Tompkins, within the former portions of those counties embraced within the limits of Schuyler county. I deny that the legislature has any power to subject the people of that territory to such conflicting jurisdictions. It would be abusive and intolerable. The power of the clerk of a county to receive and file a statement and confession of judgment, indorse the roll and adjust the costs, and give transcripts of the docket, and the power of the sheriff to collect any executions on such judgments, are acts all *pertaining to the jurisdiction of this court*, and in my opinion are all embraced within the exception aforesaid; as much as the power of a grand jury in either of the original counties to indict, and the power of the court of oyer and terminer, sitting in Steuben, Tompkins and Chemung counties, to try a person for murder committed within such county, or that of the sheriff of the proper county to execute such person after such conviction. Suppose the clerk had committed some neglect in docketing this judgment, for which an action would lie; or suppose the defendant, or the parties making this motion, instead of moving to set aside this judgment and execution, had elected to sue the sheriff in trespass for levying the execution, where would the venue have been laid in these cases? Both the sheriff and clerk are entitled to be sued in their own county, and cannot be sued elsewhere. (§ 123 *of Code.*) The fact that they cannot be sued in their own county, for official acts, must imply that they have no county, are legal officers of no county, and that their acts as clerk and sheriff, so far as relates to this court, are utterly unauthorized. Before the passage of this act, the rights of the people comprised within this new county, for the collection of debts and the enforcement of claims, and their liabilities in respect to judicial prosecutions, were clear and explicit in respect to this court in its several branches or

departments. The legislature, in my opinion, in passing the act providing for the erection of the new county of Schuyler, did not intend to invade or change those rights, immunities or liabilities, or in any manner to affect them until a complete transfer of such rights and immunities could and should take place by the substitution of a new county with full and complete constitutional proportions demanding the support and the local allegiance of the people. The provisional arrangement made in this act for the creation of such a county this court has held, in 19 *Barb.* 81, was constitutional. According to this decision, and the obvious intent of the legislature, the county will be complete in the properties essential to its separate constitutional existence when the legislature shall have assigned it to some judicial district and provided for its proper representation in the respective branches of the legislature of the state. Until this is done, the formation of the county is incomplete, and the act for its erection is, in my opinion, entirely inoperative, so far as respects this court and circuit courts, and courts of oyer and terminer, whose respective functions and jurisdiction must be exercised in all respects precisely as if no steps had been taken by the legislature for the organization of the new county. This construction of the act in question is due to the legislature which passed it; is due to the proper and orderly conduct of judicial proceedings in the territory in question, and is due to the peace, welfare and best interests of the people within its limits. The motion to set aside the judgment should be granted, with costs.

WELLES, J. The judgments in all of these cases were each entered by confession, without action, under §§ 382, 383 and 384 of the code. The first two were entered and docketed in the office of the clerk of Schuyler county, and the last two in the office of the clerk of Steuben county. It is insisted in behalf of the plaintiffs in the last three causes that the judgment in the first is void, for reasons which we will proceed to consider.

It is contended, in the first place, that the act erecting the county of Schuyler does not authorize judgments in the supreme

court to be entered and docketed therein until, by the provisions of that act, it shall become annexed to one of the judicial districts of the state. Before considering this objection, it should be premised that the direct authority for entering judgments of this description in any county is not to be found elsewhere than in the three sections referred to, which constitute chapter 3 of title 12, of part 2 of the code of procedure. The chapter referred to provides in express terms that a judgment may be entered *by confession, without action.* The confession, which is to be the foundation of the judgment, consists of a statement in writing, signed by the defendant and verified by his oath. This statement may be filed with a county clerk or with the clerk of the superior court of the city of New York, who shall indorse upon it, and enter in the judgment book, a judgment of the supreme or superior court for the amount confessed. It will be perceived that in entering and perfecting these judgments by confession, no judicial action of any court or officer is contemplated. It is all accomplished by the acts of the parties, with the ministerial acts of the clerk. When these are performed in pursuance of the statute, the law pronounces the judgment. In the case of the judgment sought to be set aside on this motion, the confession or statement, with the judgment indorsed thereon, was filed with the clerk of Schuyler county, and the judgment entered by him in the judgment book kept in his office. This would seem to be sufficient in regard to the office in which, and the person by whom, the judgment was entered, unless the objection of the counsel of the moving parties is a sound one, that by the act erecting the county of Schuyler, (*Sess. Laws of* 1854, *ch.* 386,) the time had not arrived when the judgment in question was entered, at which the clerk of Schuyler county would have the right to enter it.

There is no specific provision in the act, authorizing the clerk of Schuyler county to enter this or any other class of judgments at any time whatever. But, in my judgment, there are in the statute last referred to, provisions as ample and effective to the object in view, as if the authority was contained in express terms, and which confer upon the clerk of Schuyler county pre-

cisely the same powers, in this respect, as those possessed by any other county clerk in the state. Section 6 of that act declares that the territory therein described shall, from and after the passage of the act, be, for all purposes, except for the election of members of the legislature, and justices of the supreme court, and for the holding and jurisdiction of supreme and circuit courts and courts of oyer and terminer, until after the then next state census and enumeration, and thereafter for all purposes whatever, a separate and distinct county, &c.; and the freeholders and inhabitants of the county of Schuyler, for all purposes, (except as aforesaid,) shall have and enjoy all and every the same rights, powers and privileges as the freeholders and inhabitants of any of the counties of this state are by law entitled to have and enjoy, and not subject to be assessed and taxed by any of the counties from which they are by the same act taken. Sections 9, 10 and 11 provide for transcribing such of the books, records and papers of the counties of Chemung, Steuben and Tompkins, (from which the new county was taken,) as concern the county of Schuyler and the real property therein, including dockets of judgments, which are to be deposited in the clerk's office of the county of Schuyler. Section 12 declares that all county officers for the county of Schuyler, who are authorized by law to be elected, shall be elected at the then next general election, (1854,) and the officers elected thereat shall hold their offices respectively for the term as now provided by law for the office to which they are elected, estimating the time from the first day of January next after their election. Among the officers authorized by law to be elected are those of county judge, sheriff and clerk. After various other provisions, necessary to a complete organization of the county, not important for the purpose of the questions now involved to be specified, we come to the 26th and last section of the act, which provides that "for all judicial purposes, so far as relates to surrogates' courts, and county courts, and courts of general sessions, and the jurisdiction and duties of county judge and surrogate, justices of the sessions, county clerks, sheriffs and coroners, and the service and enforcement of judicial process, this act shall not

take effect until the first day of January, 1855; but for all other purposes, except as hereinbefore excepted, this act shall take effect immediately."

It is entirely manifest from these provisions that the legislature intended that on and after the first day of January, 1855, the county of Schuyler should be placed upon an equal footing, and possess the same general attributes, with the other counties of the state, with the exceptions only of the election of members of the legislature and justices of the supreme court, and the holding and jurisdiction of supreme and circuit courts and courts of oyer and terminer, and after the then next state census and enumeration, for all purposes whatever. In the case of *De-Camp* v. *Eveland*, (19 *Barb.* 91,) this court held that by the words "next state census and enumeration," as used in the act erecting this county, must be intended and understood, not only the census and enumeration, but also the apportionment by the legislature of the senate, judicial and assembly districts.

I assume that at the general election in 1854, a county judge and surrogate, justices of the sessions, sheriff, clerk and coroners for the county of Schuyler were duly elected, and that they all duly entered upon the discharge of the duties of their respective offices on the first day of January, 1855, or within such time thereafter as the law prescribes. We have then, at the time the judgment in question was entered, a clerk of the county of Schuyler to receive and file this confession and enter and perfect the judgment thereon, according to the provisions of the code, which duty the papers show he discharged. These acts of the clerk are not embraced in the exception mentioned in the sixth section; no one will contend that they had any thing to do with the election of the officers mentioned in the exception; and it is equally clear to my mind that his acts in question are not included in that part of the exception which relates to the holding or jurisdiction of supreme or circuit courts or courts of oyer and terminer. As heretofore suggested, the judgment was not the result of any judicial action of any court or officer. It was not necessary that a court should be held in Schuyler county, either actually or in legal contemplation, in order to the regu-

larity or perfecting of the judgment, which was, so far as any judicial action was involved, a proceeding entirely *in pais*, and does not, as has been suggested, presuppose a trial. And as to the jurisdiction of the supreme court, it is not perceived how or in what sense it was trenched upon or interfered with. Such jurisdiction was and is co-extensive with the state; and I entertain no doubt of the constitutional power of the legislature to provide for the entry and docketing of judgments by confession or otherwise, at any place or places in the state, either in the offices of county clerks, town clerks or elsewhere, and at the same time declaring them judgments of the supreme court.

It has been supposed that judgments docketed in the counties of Tompkins, Chemung and Steuben, after January 1st, 1855, would thereby become liens upon real estate in those parts of the county of Schuyler embraced in those counties respectively at the time of the passage of the act, and that the process of this court in respect to the inhabitants of Schuyler county, must go to the sheriffs of Chemung, Steuben or Tompkins county, the same as before the passage of the act; and it is argued that to allow the docketing of judgments in Schuyler county at the same time, thereby creating liens, to be enforced through process to be executed by the sheriff of that county, would lead to conflict and confusion so great as either to show that the latter was never the intention of the legislature, or if it was, that it involves an absurdity sufficient to invalidate the provision.

Admitting the premises of this argument, I have failed entirely to perceive any force in the conclusions sought to be drawn from them. Suppose a judgment docketed in Schuyler county against an individual residing, and having real and personal property in, that county, and another judgment against the same individual docketed in Steuben county. Suppose also executions upon these judgments in the hands of the sheriffs of the counties where they were respectively entered and docketed. The execution first delivered would have the preference in respect to the personal property, and the judgment first docketed in respect to the real estate. At a former period of our judicial history, a lien was created against the real estate of a party in

every part of the state, by docketing a judgment against him in the supreme court in either of the clerk's offices of that court. At the same time, a judgment against him in the court of common pleas of any county in the state, duly docketed, was a lien upon his real estate in that county. Executions upon both judgments might be in the hands of the sheriff for collection at the same time. Alterations were from time to time made in the law at subsequent periods, respecting the liens of judgments, and among others a judgment of a court of common pleas in one county might be made a lien in another, by filing a transcript, &c. in the latter. Executions upon a judgment or judgments in the supreme court, and upon judgments in the court of common pleas of different counties, might all be in the hands of the sheriff at the same time, and also executions issued by justices of the peace against the defendant's personal property might be in the hands of constables for collection. In such or the like cases, there never was supposed to exist any necessary conflict of authority, or confusion or insuperable difficulty of proceeding; and yet, if I mistake not, there was quite as much as in the case under consideration, upon the assumption stated. In truth there is no conflict or confusion in either case. But in my judgment, the premises of the argument are not true. A judgment docketed in either of the counties from which the territory of Schuyler was taken, after the first day of January, 1855, was and is not a lien upon real estate in Schuyler, until docketed there, and can only be executed by the sheriff of Schuyler county, after being duly docketed in that county. This, it seems to me, is the plain and obvious meaning of the act, and relieves the case of all the imaginary difficulties supposed.

Upon the argument, it was urged, among other things, that the 26th section of the act erecting the county of Schuyler was in conflict with the provisions of the constitution, contained in section four of article six of that instrument, which requires judicial districts to be bounded by county lines, &c. That question is *res adjudicata* in this court; and it would be out of order to enter upon a reconsideration of it, so long as *DeCamp* v. *Eveland*, before referred to, stands unreversed, or the princi-

ples therein enunciated are not shown to be incorrect. I have never had any reason to change the views expressed in the prevailing opinion of the court in that case. The exception contained in the 26th section of the act, and in other sections where it becomes necessary for that purpose, leaves all the provisions of the constitution intact, to operate without obstruction, the same as if the act had never been passed. Whether the act, with its various provisions, exhibits wise or discreet legislation, it does not become the judiciary to inquire. It is simply a question of power in the legislature, which has been very fully and deliberately considered and settled in affirmance of the power, so far as this court is concerned.

In the second place it is contended by the counsel for the moving parties that the judgment in the first cause is void, as to junior judgment creditors, for the reason that the statement embraced in the confession is not in conformity with the requirements of the code. Those requirements are as follows: 1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor. 2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due. 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same. (*Code*, § 383.)

There is no question raised in respect to the first or third subdivision of the section. The objections made relate to the second subdivision, and are that the statement does not show that the sum confessed is justly due or to become due, and does not contain a sufficient specification of facts out of which the indebtedness arose. It is not stated that the sum confessed is justly due, nor is it necessary, as I think, that it should be so *stated*. Facts must be stated from which the justice of the amount confessed will appear. That, it seems to me, has been done in this case. I shall forbear going through with a critical analysis and examination of the statement, or the objections to

it. No one can fail at once, upon reading it, to conclude, if the statement be true, that the amount confessed was justly due. The verification by the defendant is all the evidence of its truth required by the code. It cannot be necessary to negative imaginary facts, which, if they existed, would invalidate the judgment. The confession must contain a concise statement, showing the facts out of which the indebtedness arose, and must show the amount justly due; that is, it must appear from such statement that the sum confessed is justly due. The statement should receive a fair and liberal interpretation. If it presents a *prima facie* case, free from ambiguity in material points, of indebtedness to the amount confessed, and presents the facts of the case in such form as to be easily comprehended by a person of common understanding, it is all, as it seems to me, that the law requires in this respect.

The statement in question shows that the defendant was indebted to the plaintiff on two several notes given by the former for borrowed money, specifying the dates and amounts of each, showing that they were due when given, and that they were both held and owned by the plaintiff; and a further indebtedness by the defendant to the plaintiff for the assumption, by the latter for the former, of the amount of another note made by him which was then past due, held and owned by the Bank of Havana, by which assumption the latter note was paid and taken up, and giving in like manner the amount, date, and parties of the last mentioned note. A short calculation will show that the amount due on these three notes was fully equal to that of the judgment at the time it was confessed. It seems to me to be a waste of words to argue in favor of the sufficiency of this statement, which to my mind is palpable on its face.

The motion should be denied, with ten dollars costs, to be paid by the parties making the motion.

Motion to set aside the judgment and subsequent proceedings granted, with $10 costs.

[Monroe General Term, December 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

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BENEDICT *vs.* STUART.

An agreement, between attorney and client, by which the former is to receive a specified sum to begin with, and the taxable costs and a certain per centage upon the amount recovered of the defendant in an action to be commenced, without any understanding that the suit shall be carried on or maintained *at his own expense*, does not amount to *champerty*, and is not void nor illegal.

The provisions of § 103 of the code are sufficiently broad and comprehensive to include and legalize such a transaction, assuming that it would, under any previous statute or statutes, have been unlawful.

APPEAL from a judgment entered upon a report of referees. The plaintiff sued upon a contract made in August, 1854, between him and his partner, Martindale, of the first part, and the defendant, of the second part, relative to the prosecution of an action against the New York Central Rail Road Company, in favor of the defendant. The interest of Martindale, in the contract, had been assigned to the plaintiff. The referees reported that the contract was illegal and void, and that the plaintiff was not entitled to recover. The plaintiff appealed.

S. Mathews, for the plaintiff.

H. R. Selden, for the defendant.

By the Court, WELLES, J. The plaintiff and his partner, Mr. Martindale, being practicing attorneys and counsellors of this state, entered into a contract with the defendant, who had a cause of action against the New York Central Rail Road Company, for a personal injury sustained by him as a passenger, by reason of a collision on said rail road; by which agreement the plaintiff and Martindale were to commence and prosecute an action in favor of the defendant against said rail road company, for such cause of action; for which services the defendant should pay or secure them $50 to begin with, and they to have the taxable costs, and twenty per cent of the amount recovered in said action. That is substantially the agreement alleged in the complaint, and proved on the trial

It is claimed by the defendant's counsel that this contract amounted to champerty, and was therefore illegal and void. The common law definition of champerty, is, a bargain with a plaintiff or defendant to divide the land or other matter sued for, between them if they prevail at law; *whereupon the champerter is to carry on the party's suit at his own expense.* (4 *Bl. Com.* 135.) This is, substantially, the definition given in all the books. It will be perceived that an essential ingredient of the crime as thus defined, is the agreement that the party prosecuting a suit for another, shall do it *at his own expense.* It is a species of maintenance, which consists in maintaining or assisting either party to a suit, by money or otherwise, to prosecute or defend. Common barratry, champerty, maintenance and embracery were all offenses of a kindred nature, the evils of which were the promotion of unjust, vexatious or needless law suits, and of a litigious and quarrelsome spirit, as also the obstruction and contamination of the fountains and channels of justice; and were crimes against public order, peace and morality. In regard to champerty, by excluding the fact that the individual accused, maintains or prosecutes the suit *at his own expense*, the principal attribute or quality of the offense is wanting, and without which, it cannot exist. It does not appear that the plaintiff and his partner, in the case under consideration, were under any obligation to carry on the action against the rail road company at their own expense; on the contrary, the intendment is, that it was to be done at the defendant's expense entirely. That part of the bargain—that the plaintiff and Mr. Martindale were to have twenty per cent of the amount to be recovered, which is the only feature of the transaction claimed to be champertous, would, when viewed in connection with the other parts of the agreement, tend to repress, rather than promote, a litigation between the defendant and the rail road company. It was nothing more nor less than an agreement between attorney and client for a contingent reward for professional services to be rendered by the former in an action, to be graduated by the amount to be recovered; a method agreed upon between the parties for fixing the measure of com-

pensation to the attorney and counsel. This, without an agreement to maintain the suit at the expense of the attorney, does not, in my opinion, constitute champerty, at common law. There have been a variety of statutory enactments, both in England and this country, from the time of the reign of Edward 1st, to the present, by which acts not embraced in the common law definitions of barratry, champerty, embracery or maintenance, and which were not punishable at common law as crimes against the public, have been declared misdemeanors, and respectively classed under one or the other of those offenses, and their punishment prescribed. Many, if not the most of the adjudged cases in the books of a modern date, have been decided in view of such enactments. I have not considered whether the case before us falls under the denunciation of any or either of those statutes, or within any of those adjudications where the acts were held to be forbidden by law. I have deemed it unnecessary to do so; for the reason, that, in my judgment, all such legislation is repealed by § 103 of the code, which provides that "all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor or counsel for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties." This language is broad and comprehensive, and sufficient to include and legalize the transaction between these parties, assuming that it would, under any previous statute or statutes, have been unlawful.

How far the common law definition of champerty, as now found in elementary treatises, is taken from old statutes, which centuries since have been repealed or superseded by other statutes, it may be difficult to determine. However that may be, they, with all other existing provisions of law on the subject as applied to agreements between attorneys and counsel with their clients respecting compensation to the former, are swept away by the section of the code referred to. There has been no direct adjudication on this subject that I have met with since the

code was enacted. In the case of *Satterlee* v. *Frazer*, (2 *Sandf. S. C. R.* 141, 2,) although decided on another ground, and the contract in that case was made before the code, the court say: "The code of procedure appears to have changed the law in this respect, and to enables parties to make such bargains as they please, with their attorneys."

In the case before us, there is no complaint of fraud, unfairness or overreaching. In a proper case, there can be no doubt of the power or duty of the court to punish an attorney, or render summary justice to the client who has been made the victim of such dishonest practices. (*Bary* v. *Whitney*, 1 *Code Rep N. S.* 101.) Upon the whole, we perceive no illegality in the agreement in question which the referees held was illegal and void; and the judgment should therefore be reversed and a new trial ordered, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

EDWARDS *vs.* CAMPBELL.

Where the payee of a promissory note, a short time before her death, and while sick, delivered the note to her sister, with directions to her to hand it to the maker, in payment or on account of, his claims for boarding the payee and furnishing her with medicines; *Held* that this was a valid cancellation of the note.

Held also, that an action could not be maintained upon such note, by a third person, after the payee's death, without showing a title thereto, derived from the personal representatives of the payee.

APPEAL from a judgment of the Steuben county court, affirming a judgment of a justice of the peace. The action before the justice was brought upon a promissory note made by the defendant, payable to Margaret Campbell or bearer, for $20, dated September 15, 1852, and payable on or before the first of April next after its date. On the trial it appeared that

the payee of the note was married to John Brotsman, in October 1852, and died at her husband's house, in February, 1854. About eight days before her death, she, being sick at the time, handed the note in question to her sister, Isabel Campbell, with directions to give it to the defendant, saying he had boarded her and been to trouble to get her medicines and he ought to have the note; for it would not be more than right for him to have it. Isabel took the note, put it in her pocket and kept it two days. She then changed her dress, and not having any pocket in the dress she put on, she put the note in her sister Margaret's trunk, and when she left Brotsman's she forgot the note. The defendant was a brother of the payee. Evidence was given tending to show that Margaret boarded with the defendant four or five months immediately before her marriage, a portion of which time she was out of health and had medicine and medical attendance, and that it was worth some $2.50 per week to board her. There was no evidence showing how the plaintiff came by the note, and the evidence disclosed nothing respecting it, after Isabel put it in her sister Margaret's trunk, until it was produced in court by the plaintiff. The justice rendered a judgment for the plaintiff, against the defendant, for $23.38, being the amount of the note and interest, besides costs, which was affirmed in the county court.

J. W. Dinniny, for the appellant.

J. C. Smith, for the respondent.

By the Court, WELLES, J. We incline to the opinion that the transaction proved, of the payee of the note, Mrs. Brotsman, delivering the note to her sister to hand to the defendant in payment or on account of his claims for boarding and taking care of her, was a valid cancellation of the note. If the note had been against another person, it would have been a good transfer of it to her brother, the defendant.

But independently of that view, we think the plaintiff failed to show a title in himself to the note. If it was not in judgment

of law canceled, it remained the property of Mrs. Brotsman at her death, and would go to her executor or administrator to be administered according to law as the property of Mrs. Brotsman No one but her legal representative could transfer it to the plaintiff or any other person. It does not appear that any one has taken out letters of administration upon her estate, and therefore no presumption can be indulged that it has been transferred legally to the plaintiff.

The judgment of the county court and that of the justice should be reversed.

[MONROE GENERAL TERM, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

THE MAYOR AND COMMON COUNCIL OF THE CITY OF AUBURN *vs.* SIMEON DRAPER.

23 425
3h 141

Where a party is in the possession of money which he has received upon a sale by him as agent of the plaintiff, of bonds issued by the plaintiff, which money belongs to the plaintiff, such party is liable for the amount, in an action for money had and received, notwithstanding the issue and sale of the bonds was unauthorized.

Where the plaintiff, having a claim against the defendant, appointed H. & R. its agents to settle and arrange the same with the defendant, and R., without the concurrence of H., effected an arrangement with the defendant by which the latter turned out to R. certain real estate and securities in full satisfaction and discharge of the plaintiff's claim, and the plaintiff, on being informed of the arrangement, promptly repudiated the same, and directed the securities to be returned to the defendant; *Held*, that the plaintiff was not bound by the settlement made by R.

THIS action was tried at the circuit court held in the county of Cayuga, in October, 1855, before Mr. Justice T. R. STRONG. The complaint contained two counts or statements of causes of action. Upon the trial the first count was abandoned, the plaintiff relying upon the second; which was, that the defendant was indebted to the plaintiffs in the sum of $60,000,

for so much money had and received by the defendant to and for the use of the plaintiffs, on the 19th day of July, 1853, alleging the same to be due and unpaid, and claiming the said amount, with interest from the time stated, and alleging the neglect and refusal of the defendant to pay the same. It is unnecessary to state the defendant's answers, as no question arose upon them at the trial. The plaintiffs, at the trial, gave evidence tending to prove that in the month of July, 1853, the defendant received from the plaintiffs one hundred bonds of the city of Auburn, issued by said city, for $1000 each, payable in twenty years from date, with interest at the rate of *seven per cent per annum*, to be sold by the defendant for the said city; that the defendant sold the bonds for the sum of $106,000, net, and received the money for the use of the city of Auburn. That the defendant actually received $107,000, on the sale of the bonds by him, but it was agreed between the plaintiffs, acting by Thomas Y. How, their agent, he being mayor of the city of Auburn at the time, and the defendant, that the latter should retain to his own use all over *six per cent* premium which he might receive on the sale of the bonds, and retain the whole proceeds in his hands at the rate of *seven per cent per annum* for the use of the money, and pay over the same to the plaintiffs as follows: $15,000 in the same month of July and $12,000 per month thereafter, until the whole should be paid, with interest as aforesaid. That the bonds were all sold by the defendant to the United States Trust Company, and the purchase money received by him; and that he paid over to the plaintiffs, from time to time, in various sums, from and including July, 1853, to and including the third day of October of the same year, the sum of $51,000, which was all he had paid over. After the plaintiffs rested, the defendant's counsel moved for a nonsuit, on the following grounds: 1. That as the plaintiffs were a municipal corporation, it was necessary, to entitle them to recover, to prove that they had the power to issue and to sell the bonds which had been delivered to the defendant; and 2. To prove that they had the power to appoint an agent to sell and transfer the bonds; and as the plaintiffs had not proved their

power so to do, they were not entitled to recover; and 3. That if How was an agent appointed by the city to sell these bonds, that was a personal trust, which he could not delegate. The motion for a nonsuit was overruled, and the defendant's counsel excepted. On the part of the defendant, evidence was given tending to prove that he purchased the bonds in question directly of the agent of the plaintiffs, agreeing to pay for them at the times and in the manner above stated. The defendant also gave in evidence a resolution of the common council of the city of Auburn, passed at a regular meeting thereof, on the 8th day of December, 1853, appointing Thomas Y. How, jr., mayor, and R. F. Russell, an alderman and chairman of the finance committee, as their agents, with power to arrange with the defendant the claims of the city of Auburn against him. Under this resolution Russell, without the concurrence of How, effected an arrangement with the defendant by which the latter turned out to Russell for the plaintiffs certain real estate and securities, upon which Russell executed a receipt and agreement, dated February 1, 1854, which, after reciting the securities and real estate, was as follows: "These securities are received in full settlement and discharge of all claims the city of Auburn have against Mr. S. Draper, and this acknowledgment of the same is signed by me in virtue of the power conferred upon me by vote of the common council of Auburn; and I hereby agree to procure and forward to the said S. Draper the acceptance of the said securities in full discharge of the debt, from the common council of Auburn, under seal of the city.

For the mayor and common council of the city of Auburn.

R. F. Russell,

Chairman Fin. Com."

The defendant gave in evidence an act of the legislature passed March 21, 1848, incorporating the city of Auburn, also an act passed July 10, 1851, to authorize the city of Auburn to borrow money to aid in constructing a rail road, &c. Also an act amendatory of the said act of July 10, 1851, passed April 2, 1852.

On the part of the plaintiffs it was shown that at a meeting

of the common council of the city of Auburn, held on the 20th of February, 1854, a resolution was adopted, "that Alderman Russell, chairman of the finance committee, be instructed to return to Mr. S. Draper the securities he offered, as payment of his debt to the city, and that the clerk notify Mr. Russell to inform Mr. Draper that his offered securities, in payment of the claim, are not accepted by the common council of the city." It was also shown that the securities mentioned were afterwards offered to the defendant, who refused to receive the same.

The judge, among other things, charged the jury, in substance, that if the defendant was the purchaser of these bonds from the plaintiffs, the latter was not entitled to recover, for the reason that there was not sufficient evidence to show that the plaintiffs were authorized to issue the said bonds. But if the defendant sold the bonds as agent or broker of the plaintiffs, and had received the money for them, he was liable for the amount unpaid, notwithstanding he was allowed by the agreement to retain the money and pay it over in monthly installments, as the same were all due before this action was commenced. To this charge the defendant's counsel excepted.

The jury found a verdict for the plaintiff for $63,973.60. The defendant now moves for a new trial.

C. A. Seward, for the defendant.

Geo. Rathbun, for the plaintiffs.

By the Court, WELLES, J. Assuming that the bonds of the city of Auburn were issued without authority of law, yet, if the defendant, as agent of the plaintiffs, sold and received the money for them, he is not at liberty to retain it to his own use. One of the principal questions at the trial was, whether the defendant was the purchaser of the bonds directly from the plaintiffs, or whether, in the transaction, he acted as the plaintiff's broker or agent, and as such received the money in question. The judge at the circuit instructed the jury, that in the former case he was not liable, but in the latter he was. The jury

could not have found for the plaintiff, under such instructions, without affirming the latter alternative. The verdict therefore settles the fact that the defendant received the money as agent of the plaintiffs, and, as such agent, holds it. The evidence was sufficient to warrant such finding; at least, enough appeared to justify the judge in submitting the question to them, and to render it improper for the court to disturb their verdict on that ground. It is therefore to be assumed as a fact established, that the defendant is in possession, or has received the proceeds, of the sale of the bonds, which proceeds belong to and is the money of the plaintiffs. By what rule of law, then, can he be excused from paying it to them? It is contended by his counsel, among other things, that as the issue and sale of the bonds was unauthorized, and the defendant was in possession of the fruits of the unlawful transaction, he, as between him and the plaintiffs, is in the better condition of the two, and that the law will not lend its aid to compel him to pay it over, but will, in such case, leave the parties where it finds them; and he invokes the advantage of the maxim, *potior est conditio possidentis*. The question may not be entirely free from difficulty. It is, as I think, the only serious one in the case. But we are of the opinion that the defendant's obligation is one degree removed from the illegality alleged, which consisted, if at all, in the unlawful issue and sale of the bonds; in that, the defendant did not act in his own name or behalf, but as the agent of the plaintiffs. He is not suing or setting up a claim for services in a business or transaction forbidden by law, or *contra bonos mores*, where the maxim *ex turpi causa, non oritur actio*, would apply; but he is found in possession of money belonging to the plaintiffs, which is the ultimate fruit of an illegal transaction, in which, however, he was not a party. When he, as the plaintiffs' agent, negotiated the sale of the bonds and received the money for them, if he disclosed to the purchaser the character in which he acted, he incurred, in the absence of any fraud on his part, no liability to such purchaser to refund the money received. If he did not disclose his agency it was his own fault. The presumption is, that such

disclosure was made, and it does not lie with him to deny it. To test the question, suppose the defendant, upon receiving the money, had committed it to a messenger or express company to carry to the plaintiffs; can it be be doubted that the messenger or express company would be liable to the plaintiffs, in case of refusal to pay over? It seems to me not; and yet it is difficult, if not impossible, upon principle, to distinguish the case supposed from the one before us. It is not for the sake of the defendant, or the person in possession, that the maxim *potior est, &c.* is applied; but it is where a party asks the assistance of the law to enforce an unlawful *executory* contract, that the law refuses its aid. Here, the sale of the bonds had become completely executed, and the money in the hands of the defendant as agent of the plaintiffs. The case of *Hamilton* v. *Kane*, (2 *Hall's Rep.* 526,) is in point, in support of the defendant's liability. The fact that in that case notes were taken from the defendant does not, in my judgment, vary the principle, or distinguish it from the present. It would not have strengthened this case for the plaintiffs, if the defendant Draper, upon receiving the money, had executed notes to the plaintiffs for it. The defense interposed, of an accord and satisfaction, entirely failed. The alleged negotiation and settlement by Russell was not binding upon the plaintiffs, it never having been ratified by them. Russell was only empowered to act in conjunction with How, who did not participate in any of the acts constituting the alleged settlement; and the plaintiffs, upon learning what the former had done, promptly repudiated his acts, and offered to return the securities which Russell had taken.

There were several subordinate questions raised and decided at the trial, which were also presented and discussed upon the argument, all of which, we think, were properly disposed of by the justice holding the circuit.

The motion for a new trial is denied, and judgment ordered for the plaintiffs upon the verdict.

[Monroe General Term, December 1, 1856 *T. R. Strong*, *Welles* and *Smith*, Justices.]

THOMAS *vs.* DICKINSON.

23 431
54 126
61 579

In an action upon a parol agreement between the plaintiff and defendant, by which the former promised to transfer to the latter a farm, and the defendant in exchange therefor, was to pay to the plaintiff a sum of money, and transfer to him an obligation to be given by C. to the defendant for the purchase money of real estate, for a specified sum, it is not erroneous for the judge to charge the jury that if the contract between the parties was that the plaintiff was to take the obligation which C. was to give to the defendant, then it became the duty of the defendant, as part of the contract, to procure the obligation, and deliver it in payment; and that, not having done so, he had failed to perform, on his part, and the action might be maintained, to recover the amount of the obligation

The construction of the contract belonged to the court, and its legal effect was correctly stated in the charge.

The agreement by the defendant, to turn out the obligation of C., necessarily involved an undertaking by him to procure it.

The contract between the parties, being made on the assumption that the obligation would be given by C., the law cast upon the defendant the risk of a default by C.

And the defendant having failed to perform that part of the agreement, in consequence of the refusal of C. to give the obligation; *Held* that the rule of damages was the value of the debt or obligation which was agreed to be transferred to the plaintiff; and that the value of that debt or obligation was *prima facie*, the amount of it.

MOTION for a new trial, on exceptions taken upon the second trial of the action at the circuit. The cause was before this court on a former occasion, upon a similar motion, after the first trial. The court then refused to grant a new trial. (*See* 14 *Barb.* 90, where the facts are stated.) On appeal to the court of appeals that judgment was reversed, and a new trial granted. (*See* 2 *Kernan*, 364.) The second trial was had at the Steuben circuit, in May, 1855, before Justice JOHNSON, and a jury. The evidence was substantially the same as on the former trial. At the close of the testimony the judge charged the jury that the principal question in the case was whether the agreement between the plaintiff and the defendant was that the plaintiff was to take in exchange for his farm, as part pay ment from the defendant, the debt, or the obligation which Camp bell was to give the defendant to secure the payment of the

purchase money of the carding machine property, or whether he was to take the carding machine property and this debt as an incident. If the agreement was that the plaintiff was to take the debt, or the obligation of Campbell, then it became the duty of the defendant, as a part of the contract, to procure the obligation and deliver it in payment; and not having done so, that he had failed to perform on his part, and the action might be maintained to recover the amount of the obligation; to which part of the said charge, the counsel for the defendant excepted. The justice further charged the jury, "that if the agreement was that the defendant was to give the plaintiff, or transfer to him, not the carding machine property, but a demand or debt, created or to be created by the purchase by Campbell from the defendant of the carding machine property, then upon such an agreement, the risk of Campbell's refusing to carry out his agreement and give the obligation to the defendant, was upon the defendant and not upon the plaintiff, and the plaintiff could not be prejudiced by Campbell's refusing to complete the purchase and give the defendant his debt, unless such refusal was by the plaintiff's interference or procurement." To which the defendant also excepted. The judge further charged the jury, that if the agreement was that the plaintiff was to take the land, or the whole of the defendant's interest in the property as it then stood, thus placing himself in the defendant's position as regards Campbell, then the plaintiff could not recover, because there was no evidence that the defendant had ever refused or declined to convey the property, either to the plaintiff or to any other person to whom the plaintiff should direct a conveyance to be made. If the plaintiff was to take the defendant's interest in this property, he was to take it subject to this imperfect agreement between the defendant and Campbell, and would have the option to carry it out or not as he might choose, and the defendant incurred no obligation whatever that Campbell should perform on his part so far as to give the security; the contract between the defendant and Campbell resting in parol at the time the trade between the plaintiff and defendant was made, was void by statute; and Campbell was under no obligation to

perform. The counsel for the defendant asked the said justice to charge the jury, "that the agreement between the defendant and Campbell, being by parol without writing, was void, and Campbell was not bound to take the property as he had agreed, and if the plaintiff knew when he agreed with the defendant that the contract between the defendant and Campbell was not in writing, unless the jury could find in the evidence that the defendant in agreeing with the plaintiff bound himself to the plaintiff that Campbell should perform his agreement so far as legally to charge him as the purchaser, then the plaintiff could not recover." The justice refused so to charge, but on the contrary thereof charged "that if the agreement was that the plaintiff should have the obligation only, the defendant was bound as matter of law to procure the obligation and deliver it to the plaintiff." To which refusal and to the charge as made, the defendant, by his counsel, excepted. The counsel for the defendant further requested the said justice to charge the jury, that "if the defendant did not so agree [as in the proposition last stated] then although the jury find that the plaintiff was to take the debt of Campbell, and the defendant was to transfer the same, no debt in fact existed, and the plaintiff cannot complain, as he knew the agreement to be void, any more than if he had agreed to take a false or fictitious security knowing it to be such." Also, "that although the defendant represented that Campbell was to secure the purchase money by mortgage, he at the same time stating the agreement showing it to be void, and at Campbell's option to take it or not, if Campbell refused without the defendant's fault to carry out his agreement, yet the defendant cannot be charged in this action, unless by the evidence it appears that Dickinson guaranteed Campbell's performance; otherwise there was no debt of Campbell's existing that could be transferred." The judge refused so to charge, to which refusal the defendant excepted. The jury rendered their verdict in favor of the plaintiff against the defendant, for $1117.28 damages.

W. Barnes, for the plaintiff.

W. Irvine, for the defendant.

By the Court, T. R. STRONG, J. The position, that the plaintiff is not entitled to recover under a declaration in assumpsit containing only the common counts, because the proof showed a special contract between the parties subsisting, and in full force, is fully answered by the decision of this court on a former occasion, and also by the decision of the court of appeals in this case. In this court, it was held, that the special contract was void by the statute of frauds; that the plaintiff having transferred his property to the defendant under a contract as to payment which was void but not illegal, if the defendant has failed to perform the contract, and is in default, the law implies a promise on his part to pay the plaintiff the balance of the value of the property unpaid, and that the proper and only remedy of the plaintiff was that which he had selected. In the court of appeals, the common counts were held to be appropriate, upon the well settled and familiar doctrine, that a party may recover under the common counts in assumpsit, the stipulated price due on a special contract not under seal, when such contract has been executed. That ground is sufficient, if the doctrine applies to cases where by the contract the mode of payment was to be special—in something else than money—as well as to those where the payment was to be in money; as to which some doubt has been entertained. (*See Underhill* v. *Pomeroy*, 2 *Hill*, 603; *S. C. in error*, 7 *id.* 388.) It is not material in this case, which court has presented the sound and proper basis for the decisions; the decision of the latter court is all that is important.

There was not, I think, any error in the instruction to the jury, in substance, that if the contract between the parties was, that the plaintiff was to take the obligation which Campbell was to give the defendant for the carding machine property, then it became the duty of the defendant, as part of the contract, to procure the obligation and deliver it in payment; and, not having done so, he has failed to perform on his part, and the

action might be maintained to recover the amount of the obliga tion. The construction of the contract belonged to the court, and the legal effect of the contract, if it was as stated, and as the jury have found, was, in my opinion, correctly stated in the instruction. Although Campbell was not bound to take the property of the defendant and give the mortgage, by reason of his agreement with the defendant being verbal, and consequently void by the statute of frauds, which fact was probably known to the plaintiff when the contract between him and the defendant was entered into, it was nevertheless expected by both parties that Campbell would perform on his part and give the mortgage; and entertaining that expectation, the defendant was willing to agree to turn out the debt against Campbell, which necessarily involved an undertaking by him to procure it. The contract in question was made on the assumption that the mortgage would be given by Campbell, and the law cast the risk of a default by Campbell on the defendant. It is plain from the terms of the contract, that the parties understood the defendant was to procure the mortgage and transfer it to the plaintiff; the plaintiff was to take the obligation—not the land with the agreement to give a mortgage—but the obligation to be created by a consummation of the agreement between Campbell and the defendant. If it had been the understanding that the plaintiff was to take the defendant's place in respect to the land and the agreement with Campbell, it would have been expressed in very different language. The fair construction of the contract in question being as stated, the failure of the defendant to perform it is clear; Campbell having refused to give the mortgage. And the rule of damages, as settled by the court of appeals, is the value of the debt which was to be transferred to the plaintiff. And the value of that debt was *prima facie* the amount of it.

It was not a question in the case, whether by the terms of the contract between the parties the defendant undertook and agreed that he would be responsible that Campbell should go on and complete his purchase of the carding machine property. The plaintiff did not pretend, and there was no evidence tending to prove, that the contract contained such terms: he relied

solely upon the contract as found by the jury, and the legal obligation arising therefrom, on the defendant, to procure and transfer to him the debt against Campbell.

I think the charge, and the several refusals to charge, were correct, and that a new trial should be denied.

[Monroe General Term, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

23 436
19a 482

The Methodist Episcopal Union Church *vs.* Picket.

In an action brought by a religious society, the plaintiffs must prove their corporate existence, if the fact is denied.

What is sufficient proof of the incorporation. Herein of the form and requisites of the certificate of incorporation.

Where a certificate of incorporation was dated May 15, 1826, and it was proved that certain persons were trustees of the society in 1850; that the society then had a house of worship; and that a subscription paper was then circulated, for the purpose of raising funds to remove the old house and erect another in its place; *Held* that this evidence warranted the conclusion that the society had, ever since the date of the certificate, acted under it as a corporation.

It is not required by the statute that a certificate of incorporation shall embrace any thing but the names of the persons elected trustees, and the name by which the trustees and their successors are thereafter to be called and known. Hence, although it is manifestly proper to show therein that all the requirements of the statute have been followed, the omission of particulars not necessary by the statute to be stated does not affect the validity of the certificate.

And it seems that a compliance with the statute, in the particulars not required to appear in the certificate, may in the absence of any proof to the contrary be presumed or inferred from the certificate, duly acknowledged and recorded and user under it; especially where that user has continued for nearly thirty years.

Although a certificate states that the presiding officers of the meeting at which trustees were elected, were chosen by a *plurality* of votes, when the statute requires those officers to be nominated by a *majority* of the members present, it will be presumed or inferred that the selection was according to the statute, if the certificate does not negative the fact that the officers were nominated by a majority, and the contrary is not proved.

A provision, in an agreement to pay money for the erection of a church, that the slips shall be sold at auction, to the highest bidder, upon the completion

of the house, and that moneys subscribed may be applied in payment of bids, is not inoperative, so as to render subscriptions void.

Such provision for a sale is to be construed as meaning such a sale as the trustees are authorized by law to make, viz. a demise and lease of the slips.

A resolution of the trustees of a religious society, that the subscribers "be required to pay their respective subscriptions in full, and that the clerk call upon them and procure the payment," is a sufficient determination by the trustees, as to the time of payment; the effect of it being that payment shall be made immediately.

MOTION by the defendant for a new trial, upon exceptions taken at the circuit. The action was brought to recover the sum of $100, the amount subscribed by the defendant towards the erection of a new church edifice by the plaintiffs, in the village of Lyons. The subscription paper, signed by the defendant and others, contained a provision that, on the completion of the house, the slips should be sold at auction, to the highest bidder; and that all sums subscribed and paid, might be applied by the subscribers or their assigns, upon the bids made at the sale of the slips. The cause was tried at the circuit in Wayne county, in April, 1853, before Justice WELLES. The jury found a verdict for the plaintiff, for $114, the amount of the defendant's subscription with interest.

Wm. Clark, for the plaintiffs.

J. T. Mackenzie, for the defendant.

By the Court, T. R. STRONG, J. It was incumbent on the plaintiffs to prove their corporate existence; and, with some hesitation, I have come to the conclusion that they have sufficiently done so. The mode of incorporation of a religious society prescribed by the third section of the "act to provide for the incorporation of religious societies," passed April 5, 1813, (3 *R. S.* 244,) under which section the plaintiffs claim to be incorporated, is, that the male persons of full age belonging to the society, are to assemble at the place where they statedly attend for divine worship, and by *plurality* of voices elect, not less than three nor more than nine persons, belonging to the society, as trustees; of the

time and place of which election, the minister, or in case of his death or absence, one of the elders or deacons &c., and for want of such officers, any other person being a member or a stated hearer, &c. shall publicly notify the congregation, at least fifteen days before the election, which notification shall be given for two successive sabbaths, &c.; that on the day of election two of the elders or church wardens, and if there be no such officers, then two members, &c. to be nominated by a *majority* of the members present, shall preside at such election, receive the votes, be judges of the qualifications of electors, and the officers to return the names of the persons elected trustees, and the said returning officers shall immediately thereafter certify under their hands and seals, the names of the persons elected to serve as trustees, &c. in which certificate the name or title by which the said trustees and their successors shall forever thereafter be called and known shall be particularly mentioned and described," which certificate, being proved or acknowledged, is to be recorded; "and such trustees, and their successors, shall also thereupon by virtue of this act, be a body corporate by the name or title expressed in such certificate." For the purpose of proving their incorporation the plaintiffs gave in evidence a certificate, acknowledged the 6th of April, 1827, before a judge of the court of common pleas of Wayne county, and recorded in the clerk's office of said county, the 13th of the same month, of which certificate the following is a copy: "Agreeably to a law of the state of New York, passed on the 5th day of April, 1813, authorizing the incorporation of churches, the male members of the Methodist Episcopal Union Church, agreeable to public notice given, met on the fifteenth day of May, one thousand eight hundred and twenty-six, in the village of Lyons, Wayne county, state of New York, at their meeting house, and by plurality of votes chose Richard Jones and Orra Bennett to preside, then proceeded to the choice of five trustees. On canvassing the votes it was found the following persons were duly elected, viz. Richard Jones, Henry Lamson, John Smock, George Alexander, Orra Bennett. We the returning officers do certify that Richard Jones, Henry Lamson, John

Smock, George Alexander and Orra Bennett were legally elected trustees for the Methodist Episcopal Union Church in the village of Lyons, agreeable to a statute passed April 5th, 1813. Given under our hands and seals, this 15th day of May, 1826.

RICHARD JONES. [L. S.]

ORRA BENNETT. [L. S.]"

The only other evidence in the case upon the question of the corporate existence of the plaintiffs is, that certain persons were trustees of the plaintiffs' society in 1850; that the plaintiffs then had a house of worship; and that the subscription in question, of the defendant, in connection with the subscriptions of others, was for the purpose of removing that house and erecting another in its place; which evidence, beyond the certificate, warrants the conclusion that the plaintiffs, ever since the date of the certificate, have acted under it as a corporation. It will be observed that the certificate does not show the time, the place, in what manner, or by whom, notice of the meeting mentioned therein was given; and that it does not state that the persons appointed to preside were elders, or church members, or that there were no such officers, or that they were members of the society, &c. And it is objected that there being no direct proof of a compliance with the act in respect to notice, and the presiding officers, the plaintiffs have failed to show they are a corporation. I think this objection is not tenable. It is not required by the statute that the certificate embrace any thing but the names of the persons elected as trustees, and the name by which the trustees and their successors were thereafter to be called and known: and therefore, although it is manifestly proper to show therein that all the requirements of the statute have been followed, the omission of particulars not necessary by the statute to be stated, does not affect the validity of the certificate. And I think a compliance with the statute, beyond what is required to appear in the certificate, in the absence of any proof to the contrary, may be presumed or inferred from the certificate, duly acknowledged and recorded, and user under it, especially where that user has continued for almost thirty years. (*All Saints Church* v. *Lovett*, 1 *Hall's N. C. R.* 191.)

In respect to the presiding officers, the certificate states that they were chosen by a *plurality* of votes, and this is made another ground of objection to the validity of the incorporation of the plaintiffs. By the statute, those officers are to be nominated by a *majority* of the members present. The certificate does not negative the fact that they were nominated by a majority, nor is the contrary proved; it does not appear that any objection was made at the time that those officers were not properly chosen; and I think the doctrine above stated applies, and that it will be presumed or inferred the selection was according to the statute.

Another objection made to the certificate is, that it does not particularly mention and describe the name or title by which the trustees and their successors shall forever thereafter be called and known; but I think the statements therein, that "the male members of the Methodist Episcopal Union Church" met &c., and that persons "were legally elected trustees for the Methodist Episcopal Union Church in the village of Lyons," &c., are a sufficient designation of the name of the corporation. It was not necessary to state in the certificate, in words, that the corporation should forever thereafter be called and known by that name.

The words "in the village of Lyons," in the certificate, I do not understand to be part of the name of the corporation; they are a mere statement of the place where the corporation is located.

It is urged by the defendant, that the trustees could not legally sell the slips upon the completion of the house; therefore the provision in the paper subscribed by the defendant, for the sale of the slips, and permitting an application of the sums subscribed, on the bids, is inoperative; and hence the subscription of the defendant is void. The provision for a sale must, I think, be construed to mean such a sale as the trustees might make by law—a demise and lease of the same. The parties must be regarded as having understood the law as to the power of the corporation in that respect, and contracted in reference to it.

The resolution of the trustees, that the subscribers "be required to pay their respective subscriptions in full, and that the clerk call upon them and procure the payment," was a sufficient determination by the trustees as to the time of payment. The effect of it was, that the payment should be made immediately.

It follows that the motion for a new trial must be denied, and that the plaintiffs must have judgment on the verdict.

[Monroe General Term, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

The Bank of Auburn *vs.* Walter and others.

In an action upon a promissory note, against the maker and indorsers, an indorser is a competent witness for his co-defendants, to prove usury in the note.

APPEAL from a judgment entered upon the report of a referee. The action was upon a promissory note for $1000, executed by the defendant Walter and indorsed by the defendant Charles A. Wheaton, the payee, and also by Horace Wheaton, the other defendant. The answer of the defendants admitted the execution of the note, but alleged that it was made to raise money on; and that the plaintiff discounted it at a usurious rate of interest, and received, over and above seven per cent on said note, the sum of thirty-three dollars and thirty-three cents. The action was referred to a referee, for trial. On the hearing before him, the defendants called their co-defendant, Horace Wheaton, as a witness. The defendants proposed to prove the usury, by him. The plaintiff objected to this testimony, on the ground that the witness being a party, was not competent to answer the question, and because the proposed joint defense must be for his own benefit. The referee sustained the objection, and the counsel for the defendants excepted to such decision.

The referee reported in favor of the plaintiff for the amount of the note, with interest; and judgment being entered upon the report, the defendants appealed.

Underwood, Cox & Avery, for the plaintiff.

Sheldon & Brown, for the defendants.

By the Court, E. Darwin Smith, J. The contract of the maker and indorser of a promissory note or bill of exchange is several, and not joint. Actions were always brought against them separately, before the passage of the act of April 25, 1832, entitled "an act regulating suits on bills of exchange and promissory notes." (*Laws of* 1832, *ch.* 276.) By the first section of that act it was made lawful, "instead of bringing separate suits against the drawers, makers, indorsers and acceptors of such bill or note, to include all or any of the said parties to the bill or note in one action, and to proceed to judgment and execution in the same manner as though all the defendants were joint contractors. The rights of the several defendants or parties to the bill or note, in any suit brought in pursuance of the provisions of said act, were not affected thereby, (§ 7,) and judgment might be rendered in favor of some of the defendants against others, (§ 4;) and any one or more of the defendants were to be entitled to the testimony of any co-defendant as a witness, in all those cases where the defendant or defendants calling the witness would have been entitled to his testimony, had the suit been brought in the form theretofore used. (§ 9.) The only restraint upon the right of any party to a bill or note to call any other party, not a joint contractor with him, as a witness, in any suit upon such bill or note, after as well as before the passage of this act, was the question of *interest*. That objection might in most cases have been obviated by a release or indemnity. This necessity and objection are now swept away by section 393 of the code, which declares that "no person offered as a witness shall be excluded by reason of his interest in the event of the suit." But this section does not apply to a party to the action. Section 397 was

therefore necessary to carry out the principle of section 398, that no person shall be excluded from being a witness by reason of his interest in the event of the suit. That section provides that "a party may be examined in behalf of his co-plaintiff or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant and as to which a separate and not joint verdict or judgment can be rendered." This carries out and re-enacts the precise rule of the act of 1832 in relation to makers and indorsers of bills of exchange and promissory notes, and was doubtless chiefly designed for that purpose, in connection with the purpose above mentioned, of giving full effect to section 398. Section 120 of the code retains the provision of the act of 1832 in respect to the right to include all the parties to bills of exchange and promissory notes in one action, at the option of the plaintiff; but the legislature clearly did not intend to take away the right of makers and indorsers to use each other as witnesses, as before and after the passage of the act of 1832. The policy of the code was to liberalize and enlarge the rules in regard to the admissibility of witnesses, not to restrict them to narrower limits. The interpretation which the referee must have made, in this case, of section 397 is in conflict with this policy. It makes that section practically repeal the rule in regard to admissibility of makers and indorsers as it always existed at common law, and as it was recognized in the act of 1832, and was constantly applied under that act before the passage of the code. The defendant Horace Wheaton was clearly a competent witness for his co-defendant. His testimony could not be used for his own benefit, and the plaintiff might have had a separate judgment against him, although his evidence had made out a perfect defense for the other defendants. This brings the case within the precise language of section 397. The judgment should be reversed and a new trial ordered.

Judgment reversed.

[MONROE GENERAL TERM, December 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

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61h 422
23 444
34 552
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83 115
8h 391
37h 40
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DANIEL L. PICKARD *vs.* EDWIN W. COLLINS.

Where a plaintiff is examined as a witness for the defendant, his testimony, given on the trial of a former action, between himself and another person, which is directly contrary to what he testifies to in the second suit, may be given in evidence, as an admission.

The defendant has a right to prove the former testimony, as an admission, by any competent witness, other than the plaintiff. He may also prove it by the plaintiff himself, unless the latter objects on the ground that he is privileged from answering.

A plaintiff is not bound to answer as to what he testified on a former trial; inasmuch as he might thus aid a prosecution against him for perjury. But the right to object is personal to him, as a witness.

A defendant is not precluded from examining the plaintiff, or any other person, on that point, because his testimony might impeach the plaintiff as a witness. He has no right to use it for the latter purpose. Having called the plaintiff to testify, he thereby represents him as deserving of credit, and is precluded from denying it by introducing evidence for the purpose of impeaching him, showing either that his general character for truth is bad, or that he has made previous contradictory statements. But he may, by any pertinent evidence, prove a fact to be otherwise than as testified to by the plaintiff.

A party is always at liberty to show what the material facts of a case are, although in so doing he may contradict the testimony of some of his own witnesses, and the evidence may thus tend, indirectly, to discredit them. And these facts may be shown by the admissions of the opposite party, as well as by other evidence.

The general rule, that the owner of land may use it according to his pleasure, is subject to this qualification, that he is not at liberty to use it in such a manner as to infringe the rights of others.

The maxim, so use your own that you injure not another's property, is supported by the soundest wisdom. But the injury intended is a legal injury; an invasion of some legal right, as erecting a building, or carrying on a business on one's own land, which so obstructs the enjoyment by another, of his property, as to amount to a nuisance; or removing the soil, or placing something on the soil of another.

These are violations of absolute legal rights, and are strict legal injuries. But darkening another's windows, or depriving him of a prospect, by building on one's own land, where no right to the light unobstructed has been acquired by grant or prescription, digging by a person on his own soil, so as to endanger the foundation of the building of the adjoining owner, and numerous similar acts by an owner of land, impairing the enjoyment and value of the land of another, short of what the law deems a nuisance, invade no legal right, and hence are not legal injuries.

In an action to recover damages of the defendant, for erecting a high fence upon his premises immediately adjoining the plaintiff's dwelling house, and befor

his windows and doors, it is erroneous to charge the jury that he defendant had not a right to build a fence on his own land, for the purpose of excluding the light from the plaintiff's dwelling, and that if he has done so, and it has had that effect, he is responsible in damages for the injury.

The liability of the defendant, in such a case ought not to be made to depend upon the *motives* with which the erection was made.

Bad motives, in doing an act which violates no legal right of another, cannot make the act a ground of action.

In an action to recover damages for a nuisance caused by the erection of a barn or stable upon the defendant's land adjoining the plaintiff's dwelling house, and allowing manure and filthy water to accumulate and stand in the cellar thereof, it is not erroneous for the judge to charge the jury that if the defendant constructed and adapted the barn so that, in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, the defendant is liable for the nuisance thus caused by his tenants, to whom he had let the barn.

Where a barn is built to be used in a certain way, and its use in that way would necessarily, under ordinary circumstances, be a nuisance, if it is let to a tenant who in fact uses it in that way, and such use proves noxious or injurious to adjoining occupants, the owner is liable for the injury.

But if the use of the barn in that way proves a nuisance, by reason of water in the cellar, and that is a special unusual circumstance, the owner is not liable for the nuisance, unless he knew, or had reason to believe, when he let the barn, that the use of it in the ordinary mode would prove a nuisance.

APPEAL by the defendant from a judgment entered at a special term, after a trial at the circuit.

The complaint contained five counts. The first count charged that the defendant, in 1849, caused to be erected on his premises and along or near the north and east boundary lines of the plaintiff's premises in the city of Rochester a high board fence, from eight to ten feet in height, and covered the same with gas tar, thereby causing offensive odors to enter the plaintiff's dwelling house, and creating a nuisance therein. The second count charged that the defendant, in 1850, caused to be erected on his premises, along or near the north boundary line of the plaintiff's premises, and contiguous to said dwelling, a long shed of boards, the roof of which was covered with gas tar, and caused to be placed about said shed a large quantity of combustible matter, and kept a fire burning several days near thereto, causing an offensive stench to enter said dwelling and exposing it to danger

from fire. The third count charged that the defendant, in 1850, caused to be erected on his premises, and contiguous to the premises of the plaintiff, a brick stable, and caused to be dug under the same a cellar without a drain, and suffered a large quantity of manure and filthy water to accumulate and stand therein, thereby causing noisome stenches and vapors to come upon said premises of the plaintiff, creating thereon a nuisance. The fourth count alleged that the defendant, in 1852, opened and exposed a privy vault on his premises, near said premises of the plaintiff, and dug a cellar about the same, into which the contents of said vault oozed out, and permitted the same for a long time to remain thus exposed, whereby noxious smells ascended into said dwelling, creating therein a nuisance. In the fifth count the plaintiff complained that the defendant, in 1852, procured said shed to be used as a hen house and horse barn, and allowed the manure and offal therefrom to accumulate under the windows of plaintiff's dwelling, whereby noxious odors ascended into the plaintiff's said dwelling, creating therein a nuisance. The answer denied the complaint.

The action was tried at a circuit court held in Monroe county in February, 1856, before Hon. E. DARWIN SMITH, justice. On the trial the plaintiff gave evidence proving that during the time of the alleged causes of action, the defendant occupied or controlled, built upon and let to use, premises on the corner of Elm and Chesnut streets in the city of Rochester; that such premises consisted of a dwelling house on the corner of a lot running back towards the west; that said lot was one open lot joining the grounds to the dwelling house; that during the time of the said causes of action the plaintiff inhabited the premises adjoining on Elm street; that the plaintiff's premises consisted of a dwelling house in which he lived with his family; that said house was bounded and surrounded on the north and east by said grounds of the defendant; that there was ample room in the back part of the defendant's grounds to build the barn and shed without putting them against the plaintiff's house, and that all of the grounds of the plaintiff consisted of a small front door

yard on the south of his house; that on the west his house abutted on Cedar street and had three or four windows on the north and one on the east; and proving the building of the fence mentioned in the first count of the complaint, and the painting of the same with gas tar; that the same was so painted or covered with gas tar, by the defendant, in 1849, after the premises were purchased by the plaintiff, but before he occupied them, and remained up about a year, and was repeatedly during that time painted with gas tar; and that the said gas tar gave off offensive and sickening odors—offensive and sickening to the plaintiff and his family. The plaintiff also gave evidence proving that the defendant, about the month of January, 1850, erected the shed mentioned in the second count of the complaint, a portion of which he also painted with gas tar, which was in the like manner offensive to the plaintiff's family; that said shed was built on the north of the plaintiff's house, on the grounds of which the defendant had the care and letting, and that the inside wall of the shed was a part of the said fence, and that said shed was opposite some of the windows of the plaintiff's house; also, that a fire was one night seen blazing in the defendant's yard about ten feet from the shed; that the defendant was waked in the night and notified of it, and got up and helped put it out. But no proof was given as to who built or started such fire. The plaintiff further gave evidence proving that in the spring of the year 1850, the defendant let his dwelling house next east of the plaintiff's premises to Ogilvie L. Sheldon, and in the month of September following let to him the premises north thereof, and north of the plaintiff's premises, having previously agreed with Sheldon to erect thereon a brick horse barn for said Sheldon's use: that he so erected the same during the summer of the year 1850, locating the same on the north of the plaintiff's premises, and only about a foot and a half therefrom, building it with a cellar about seven feet deep, of which about four were below the surface of the earth, without a drain, although it was perfectly practicable to have made a drain—building it with a trap door in the floor, down which manure might be thrown, with windows and a door in the cellar on the north and

west sides thereof, and with a double door on the west end, on the first floor, for admitting a carriage, and a door and windows on the north side thereof, and that on so building he let the same together with said shed which was west thereof, and the surrounding grounds to Sheldon. That Sheldon took possession of said stable and horse barn and of said shed and grounds connected therewith, on the first day of September, 1850, in pursuance of the terms of said lease, and continued in possession and use thereof till the expiration of such lease; that said Sheldon was in the habit of throwing a part of the manure from his horse into the cellar, and a part of it out of the north door of the barn; that water stood in the cellar and the manure saturated with the water created offensive odors, which affected the atmosphere of the plaintiff's dwelling, and rendered the same noxious and uncomfortable to the plaintiff and his family; and that Dr. Dodge and Dr. Collins, the subsequent tenants, who in like manner hired the premises, continued to use them in the same way and with the same effect. As to the state and condition of the premises at the time Dodge and Collins took them of the defendant, Thomas B. Collins testified that his impression was, that when he and Dodge went into the barn, there was no manure there; and when they went away, a large pile had gathered there. No other testimony was given on that point. Sheldon stated that while he occupied such barn, he informed the defendant that the barn and manure were very offensive to the plaintiff's family, and desired the defendant to drain the cellar or to fill it up; but he did not do either, and said that he did not care for Pickard's family, and refused to make a drain or fill up the cellar. The plaintiff further gave evidence that the tenants of the said shed had used it for a joiner's shop and lumber room, and as a henery, and that a great stench therefrom filled the plaintiff's house and rendered it unfit for habitation; and that for a while in the summer of 1853, and before the commencement of this action, a tenant had used it as a stable and had kept his horse there, at which time the manure had been piled up under the plaintiff's windows, and that on opening the windows to the plaintiff's house, a horrid odor from the manure of the

hens and horse came into the dwelling and rendered the atmosphere of the plaintiff's dwelling highly offensive and noxious. As to the occupancy of the shed at that time, Robert R. Harris testified that he knew, by sight, the tenant that occupied the shed for a stable; that he did not know who had used it for other purposes; that he did not know that Mr. Collins, the defendant, had a horse at that time; that he as city superintendent, by direction of the board of health, proceeded to abate the nuisance, but instead of removing the offensive matter and leaving the shed standing, he tore down the shed and left the offensive matter unremoved; that before tearing it down he had examined the shed and requested the defendant to remove it, who treated the subject indifferently, and replied that it was not a nuisance, and refused to remove it; and that the superintendent then requested him to go with him and examine it, but the defendant refused to do so; that when the superintendent proceeded to pull it down, the defendant, with his attorney, came to the spot to forbid pulling down the shed, but it was already down. It further appeared that defendant had never directed nor advised the tenant how to use the premises, nor where to put the manure. The plaintiff proved that while Sheldon occupied the horse barn, the defendant put gas tar upon the roof from time to time—as many as three or four coats—thereby creating an offensive odor, nauseous to Sheldon's own family as well as to the plaintiff's family; that it took each coat some three or four days to dry, and that until dry, it smelled badly; that in drying the odor passed off. The plaintiff also gave evidence, proving that in the summer of 1852, the defendant put up a brick building on the east side of the plaintiff's dwelling for a joiner's shop, and on the spot was an old privy vault; that in digging and excavating for the foundation of such building, the earth was removed from around the privy vault and the contents oozed out into the defendant's cellar, producing an insufferable stench, which continued some two or three weeks before the same was removed by the defendant. As to the defendant's fence, the plaintiff gave evidence proving that the same rendered the plain-

tiff's habitation very dark, cutting off the light and eaving it too dark to inhabit.

The defendant's counsel proved the title of the premises adjoining the plaintiff on the north and east to be in Oliver Collins, by deed dated prior to 1849, and then read in evidence the lease above mentioned. He then offered in evidence a judgment roll of a judgment in favor of Oliver Collins, plaintiff, against said Pickard, defendant, docketed Nov. 2, 1853. That suit was for a trespass, alleged to have been committed by Pickard on the lands of Oliver Collins, which trespass was said to have consisted in sawing off and carrying away portions of a fence, throwing snow off from his house on to a shed, injuring shrubbery, throwing slops, and tipping over a barrel of gas tar and spreading it around, and on a fence of Oliver Collins. The plaintiff in that suit recovered a judgment against the defendant therein, for $37.50 damages, and $58.03 costs.

This proof was objected to on the ground that, 1. It was inadmissible under the pleadings. 2. That it was entirely immaterial what trespasses Pickard had committed against Oliver Collins or his premises. 3. On the ground that the judgment roll was not filed until November, 1853, while this action was commenced June 28th, 1853. 4. That the judgment was not *inter partes*, nor between privies, and was not admissible in favor of the defendant. This objection was sustained, and the defendant's counsel excepted.

Lysander Farrar called and sworn for the defendant, testified: "I am an attorney and counsellor of this court; some years ago I defended Edwin W. Collins on the trial of an indictment for a nuisance in connection with the premises now in suit; Daniel L. Pickard was examined as a witness for the people, and gave evidence; I cannot recollect what he testified; I kept the minutes of said trial. (The minutes were here produced.) These are my minutes; I took them at the trial; I endeavored to take them correctly; I believe that I did take them correctly; on reading them they do not refresh my memory as to what Pickard testified to; endeavored to take the minutes correctly, but I cannot now say whether they are

correct, nor can I say whether they contain all the testimony that Pickard gave at the time." The defendant's counsel now proposed that the witness read from his minutes what Pickard testified to at that trial. To this the plaintiff's counsel objected, on the ground that witness could not say that the minutes were correct, and could not say that they contained all the testimony given by Pickard. Objection sustained and defendant's counsel excepted. *Daniel L. Pickard* called and sworn for the defendant, testified: "I am plaintiff in this action; I occupy the premises; I began to occupy them in the neighborhood of 1848 or 1849; I left them two years ago last summer, as near as I can recollect; I was a witness on a trial of an indictment against Collins for a nuisance; I testified on that occasion about this gas tar; the fence was built after I bought the premises, but before I moved in; I can't tell how long before I moved in the fence was built; when I moved in the fence was there and freshly built; the fence was painted with gas tar before I went in, and repeatedly after; portions of the fence have been painted after I went in there; it continued to be painted over in parts as long as I lived there." Question by the defendant's counsel: "Did you or did you not state, upon the trial of the indictment, that no gas tar had been put on the fence after you moved in there?" Question objected to, on the ground that the defendant had made the plaintiff his witness and could not impeach him; and also that he should ask him as to the fact, and not to what he had before said; and also that the question was immaterial. The defendant's counsel claimed that he was entitled to the answer, as an admission of a party to the suit. Objection sustained and question overruled, to which the defendant's counsel excepted. Question by the defendant's counsel: "Did you on that occasion testify that it was yourself that upset the barrel of gas tar, and spilled it on the ground?" Objected to on the grounds stated in objection to last question. Objection sustained, and exception. "I did upset the barrel of gas tar; I bought a jug of gas tar from the gas works; I delivered it to the gentleman who sent for it, Mr. Adams; I afterwards saw the jug; after I took it from the

gas works, I saw the jug in Mr. Adams' barn; about the time Mr. Adams left Rochester." Question by the defendant's coun sel: "Did you on the former trial state that you could not tell what you did with the contents of the jug without criminating yourself?" Objected to on the grounds as above. Objection sustained and exception taken by the defendant's counsel. On the case thus made, the defendant's counsel asked the plaintiff's counsel if they claimed to recover on all the counts of the complaint, to which the reply was in the affirmative. Thereupon the defendant's counsel moved for a nonsuit, on the third count or cause of action set up in the complaint, and objected to the plaintiff's recovering therefor, on the ground that the defendant only built the barn and let the premises to tenants, and it was by the way and manner in which the tenants used the barn or stable that the nuisance, if any, was produced, and not by any thing done or suffered by the defendant. This motion and objection were overruled by the court, and to that decision the defendant's counsel excepted. The defendant then moved for a nonsuit, and objected to the plaintiff's recovering on the fifth count or cause of action stated in the complaint, that is, for the shed being used as a horse stable and henery; on the ground that it did not appear that the defendant had ever so used it or authorized such use, and that he was not responsible for any use to which it was put by tenants. This motion and objection were overruled by the court, and to such decision the defendant's counsel excepted. The defendant's counsel then objected to the plaintiff's recovery in respect to the fire kindled in the yard, on the ground that it did not appear that the defendant kindled it; and insisted that the court should not submit that matter to the jury, but such objection and request were overruled by the court, and to his decision the defendant's counsel excepted. The defendant's counsel claimed that in respect to the brick horse barn or stable, the defendant had absolutely a legal right to build and let it, and hence the plaintiff could not call in question the defendant's motives in so doing, and make them a cause of action. The defendant's counsel claimed the same in respect to the

building and letting the shed and other premises; but that if the defendant's motives in building and letting either the barn or shed could give the plaintiff a right of action like this, still there was no sufficient proof for the jury of any motive or design in the defendant to wrong or injure the plaintiff in so doing. But the court overruled these objections, and decided that the case must go to the jury on all the causes of action stated in the complaint, and to that decision the defendant's counsel excepted. The judge charged the jury, among other things, in substance as follows: "The case involves purely a question of fact. The action is for nuisance, and the complaint contains five counts. The first count, or cause of action, is for erecting a high board fence close to the plaintiff's windows, and covering it with gas tar, thereby darkening the plaintiff's rooms, and conveying into them noxious and sickening odors. The second relates to the shed and henery. The third to the barn. The fourth to the privy vault. And the fifth to the fire in the defendant's yard. If either of these is a nuisance, the plaintiff is entitled to recover. A nuisance is something noxious or offensive to any of the senses, either to the sense of sight or hearing, as well as of smelling; and that may be a nuisance which offends none of the senses, if it be deleterious to the health or safety, or noxious to human enjoyment. What is a nuisance is a question of fact. The first proposition of law which I submit to you is that every man hath such a title to his own land that he may use it for all purposes to which such land is usually applied, without being answerable for the consequences, direct or indirect, to others. For instance, the defendant in this action had a perfect right to build a fence on this lot in the usual and customary way, for the ordinary and legitimate enjoyment of his premises. But he had not a right to build a fence in an unusual manner, materially to annoy and injure his neighbor, and deprive him of the use and enjoyment of his lot; for a man is bound so to use his own as to do no needless injury to his neighbor. As an illustration of the principle of law which I have stated, I will give you the following: While as a general rule a person may use his property as he wishes to, it has been de-

cided that a man cannot, on a city lot, dig down to an unusual and great depth for purposes extraordinary to the common use of such land, whereby the land of his adjoining neighbor is undermined and falls in, and that he is liable for the damages if he do so. To this proposition the defendant's counsel excepted. So a man may dig in his own grounds in the usual way, and of any ordinary depth, but a man has no right to dig down a pit or trench of unusual depth adjoining the house or building of his neighbor, and if he do so, and his neighbor's wall or earth thereby fall into it, he is liable for the damage. The question is whether the construction of this fence and the putting on of gas tar, were within any of the purposes for which such land is ordinarily used. If it was it was lawful, whoever may be injured. But if you find that the defendant put this fence there, or covered it with gas tar, as stated by the witness, for the purpose of injuring or annoying the plaintiff, and rendering the use and enjoyment of his premises uncomfortable or unhealthy, and it had that effect, that would be an unreasonable use of his property, and he must be responsible for any damages or injury done thereby. The defendant had a right to build and use a barn on the lands occupied by him, and to let it to be used to tenants, and he is not responsible for the acts of the tenants unless procured or instigated by him. But if you shall find that this barn was noxious and injurious, and a nuisance, in fact, to the plaintiff, and that the defendant located it where it was, and constructed and adapted it so that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, then the defendant is liable for the nuisance thus caused, and the plaintiff is entitled to recover in respect to such nuisance. If the barn was built to be used in a certain way, and was let to a tenant who in fact used it in that way, and such use proved injurious or noxious to the plaintiff, the defendant is responsible for such injury. The same is true of the shed which I have stated respecting the barn. As to the privy vault, the defendant had a perfect right to remove it, with a view to improve his premises or otherwise. The removal of it must necessarily occasion more

or less annoyance. If it was removed so as to occasion no more offense than was necessary, the defendant is not liable; but if in the time or manner of doing it he was remiss or negligent, or if he allowed it to infect the surrounding atmosphere an unreasonable length of time, it would be a nuisance during such needless excess of time, for which he is responsible. There is no evidence that the defendant kindled or procured the fire to be kindled; and even had he been the author of it with an intent to injure the plaintiff, an action against him for malicious mischief would have been more proper than this action for nuisance. I am of opinion that the fire was not a nuisance, and that the plaintiff is not entitled to recover in respect to this cause of action. If you shall find that the henery was erected and used, or procured to be used, by the defendant, in an unusual and extraordinary manner, and so as to injure or annoy the plaintiff, and that the defendant used it, or procured it to be used, with a design to injure and annoy the plaintiff, and that it actually was injurious and annoying to the plaintiff, that would make it a nuisance while it so remained, and the plaintiff is entitled to your verdict in respect to such nuisance. If you find for the plaintiff, you are to give him, 1st. Damages equal to his pecuniary loss, and a just recompense for his discomfort and annoyance from these nuisances. 2d. The case is one for exemplary damages; if you find that the alleged nuisances were put there maliciously, and with intent to injure and annoy the plaintiff, in that case you are entitled to give damages by way of smart money. You may give such damages as you shall think proper under the circumstances of the case, and such as shall be calculated to deter others from committing like offenses. In this respect you are not limited by any precise rules of law. It is a question within your discretion." The defendant's counsel excepted to each and every part of the above charge. The jury found a verdict for the plaintiff for $1250.

J. N. Pomeroy, for the plaintiff.

E. A. Hopkins, for the defendant.

By the Court, T. R. STRONG, J. The testimony of the plaintiff, on the trial of another case, which was proposed to be proved, to the effect that no gas tar had been put on the fence after he moved on the premises occupied by him, which is directly contrary to his testimony on the trial of this case, regarded as an admission, was relevant evidence in this case on the issue joined upon the first cause of action; and the defendant clearly had a right to prove that testimony as an admission, by any competent witness other than the plaintiff. I do not perceive why proof of the admission might not be made by the plaintiff himself, unless the plaintiff objected on the ground that he was privileged from answering. He was not bound to answer as to what he testified on a former trial, as he might thus aid a prosecution against him for perjury. (*Bellinger* v. *The People*, 8 *Wend.* 595. *Mitchell* v. *Hinman*, *Id.* 667.) But the right to object was personal to him as a witness. (*The People* v. *Bodine*, 1 *Denio*, 281. *Ward* v. *The People*, 6 *Hill*, 144.) No objection was made by the plaintiff personally, and the objection by his counsel in his behalf as a party, was not put on the ground of privilege, but on the grounds that the defendant had made the plaintiff his witness, and could not impeach him; that the plaintiff should be asked as to the fact, and not as to what he had before said; and also that the question was immaterial. The defendant was not precluded from examining the plaintiff or any other person, on the point, because his testimony, beyond the admission, and thus tending to prove the fact admitted, might impeach the plaintiff as a witness. He had no right to use it for the latter purpose; having called the plaintiff to testify, he thereby represented him as deserving of credit, and was concluded from denying it by introducing evidence for the purpose of impeaching him, showing either that his general character for truth was bad, or that he had made previous contradictory statements; but he might, by any pertinent evidence, prove a fact to be otherwise than as testified to by the plaintiff. A party is always at liberty to show what the material facts of a case are, although in so doing he may contradict the testimony of some of his own witnesses, and the evidence may thus tend

indirectly to discredit them. (*Thompson* v. *Blanchard*, 4 *Comst.* 303, 311.) And those facts may be shown by the admissions of the opposite party as well as by other evidence.

The principal questions in the case arise upon the instructions to the jury. It is alleged in the complaint as the first cause of action, that the defendant, contriving and wrongfully intending to annoy and injure the plaintiff in the use of his dwelling house, erected, or caused to be erected, on the defendant's premises, immediately adjoining the plaintiff's dwelling house, and before his windows and doors, a board fence of from eight to ten feet high, and covered it with gas tar, and permitted it to remain so, by means of which, offensive and unwholesome smells arose and came into and upon the premises of the plaintiff, and annoyed him, and rendered his said dwelling house unhealthy and unfit for habitation. Evidence was given by the plaintiff in support of this cause of action. The jury were charged, as to this part of the case, that the defendant "had not a right to build a fence in an unusual manner, materially to injure and annoy his neighbor, and deprive him of the use and enjoyment of his lot; for a man is bound so to use his own as to do no needless injury to his neighbor;" and further, "if you find the defendant put this fence there, *or* covered it with gas tar, as stated by the witness, for the purpose of injuring or annoying the plaintiff and rendering the use and enjoyment of his premises uncomfortable or unhealthy, and it had that effect, that would be an unreasonable use of his property, and he must be responsible for any damages or injury done thereby." It is no part of the cause of action stated in the complaint, that the defendant erected or continued this fence, and thereby shut out the light from the dwelling of the plaintiff; the gist of the complaint, in respect to the fence, is covering the fence with gas tar, and the annoyance and discomfort from the offensive and unwholesome smells thereby occasioned; but evidence was given by the plaintiff, without objection, of the darkening of the house by means of this fence, and the jury were told in the charge, previous to the instructions above recited, that it formed part of the first cause of action. No specific objection, however, was taken to submitting the

subject to the jury, as clearly was done in the charge, as not embraced within the issue, and it is now too late to raise the objection for the first time. The question of the accuracy of the instructions in point of law, not their applicability to the c plaint, is all that can be inquired into, and that is properly pr sented by the exception. The doctrine of the instructions, as applied to that part of the case which relates to the fence, and its effect upon the plaintiff is, that the defendant had not a right to build a fence on his own land for the purpose of excluding the light from the plaintiff's dwelling, and that if he has done so, and it had that effect, he is responsible in damages for the injury. It is a general rule that the owner of land may use it according to his pleasure. The rule is however subject to this qualification, that he is not at liberty to use it in such a manner as to infringe the rights of others. So use your own that you injure not another's property, is a maxim of law supported by the soundest wisdom. But the injury intended is a legal injury; an invasion of some legal right, as erecting a building, or carrying on a business, on one's own land, which so obstructs the enjoyment by another of his property as to amount to a nuisance; or removing the soil, or placing something on the soil of another. These are violations of absolute legal rights and are strict legal injuries. But darkening another's windows, or depriving him of a prospect, by building on one's own land, where no right to the light unobstructed has been acquired by grant or prescription, digging by a person on his own soil so as to endanger the foundation of the building of the adjoining owner, and numerous similar acts by an owner of land, impairing the enjoyment and value of the land of another, short of what the law deems a nuisance, invade no legal right, and hence are not legal injuries. The maxim referred to does not extend to condemn such acts, as has been held in numerous cases. (*Radcliff's Ex'rs* v. *Mayor of Brooklyn*, 4 *Comst.* 195, *and cases there cited. Hay* v. *The Cohoes Company*, 2 *id.* 159. *Farrand* v. *Marshall*, 21 *Barb.* 409. *Parker* v. *Foote*, 19 *Wend.* 318.) The instruction in question, if sustained, would carry the doctrine so far, and make the owner of land liable for such acts if done with a bad

motive. The question of liability would turn upon the motive. Although the owner might, for the protection of his land, and his own comfort and profit, or any worthy motive, erect a fence, or building, which would have the effect to shut out the light from his neighbor's dwelling, he could not do so for the purpose of injury. Such a principle would be highly dangerous to the security of the enjoyment of real property. As to various modes of enjoyment, the lawfulness or unlawfulness of them would depend on the views of others as to the intentions of the owner. The fallacy of this doctrine consists in its overlooking a fatal defect in the right of action in such a case—the absence of any legal injury. Bad motives in doing an act which violates no legal right of another, cannot make that act a ground of action. But it is not necessary to examine the doctrine further on principle; it is fully settled by authority. In *Mahan* v. *Brown*, (13 *Wend.* 261,) which was an action for the obstruction of lights in the dwelling house of the plaintiff, the facts proved were, that the house was built on a lot adjoining a lot of the defendant, in which windows were placed for the admission of light and air; that the defendant, under pretense of preventing his yard from being overlooked by the windows in the plaintiff's house, but in fact from mere malice, and with the intent to exclude the light and air from the windows in question, had erected on his own lot a fence forty feet high, opposite the recess or opening in the house of the plaintiff, in consequence whereof the light and air had been excluded from the windows and the plaintiff had sustained great damage, by her apartments, which had been occupied by boarders, being rendered untenantable. The plaintiff was nonsuited. On a motion to set aside the nonsuit, which was denied, Savage, Ch. J., delivered the opinion of the court, and in the course of the opinion says, "The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do, although it is said no action lies for it. He is therefore encroaching, although not strictly and legally trespassing upon the rights of another. He enjoys an easement therefore in his neighbor's property, which in time may ripen into a right. But before

sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property." And again, "The defendant has not so used his own property as to injure another. No one, legally speaking, is injured or damnified, unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which does not belong to her; and whether the motives of the defendant were good or bad, she had no legal cause of complaint."

The charge in respect to the barn, fairly interpreted, I think, relates solely to the manner in which the barn was used, and the effect of its use, which is the cause of action stated in the third count of the complaint; and the instruction that if the defendant constructed and adapted the barn so that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, the defendant was liable for the nuisance thus caused by his tenants to whom he had let the barn, was, in my opinion, correct. The case of *Fish* v. *Dodge*, (4 *Denio*, 311,) is directly in point. It is there held that one who demises his property for the purpose of having it used in such a way as must prove offensive to others, may himself be treated as the author of the mischief. (*See also The King* v. *Pedly*, 1 *Adol. & Ellis*, 822; 28 *Eng. Com. Law R.* 220.) But the further instruction that if the barn was built to be used in a certain way, and was let to a tenant who in fact used it in that way, and such use proved noxious or injurious to the plaintiff, the defendant is responsible for the injury, I think required some modification. If the use in that way would necessarily, under ordinary circumstances, be a nuisance, the proposition is correct; but if it proved a nuisance by reason of water in the cellar, and that was a special unusual circumstance, the defendant was not liable for the nuisance, unless he knew, or had reason to believe, when he let the barn, that the use of it in the

ordinary mode would prove a nuisance. (*Fish* v. *Dodge, above cited.*)

For the error in the charge relating to the fence, mainly, I am of opinion that the judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment accordingly.

[Monroe General Term, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

Parmelee and Wiggins *vs.* Dann.

23 461
39 166
33h 617
41k 265

Where a debt is assigned, the assignment carries with it all the collateral securities held by the assignor, for its collection, although they are not mentioned or referred to in the assignment; upon the ground that in such cases the securities are incidents to the debt, which is the principal.

Upon the same principle, where the defendant, by his agreements with M. and S. by which he let land to them to plant on shares, was bound to keep the fences in repair, *it was held* that assignees in law, of the interests of M. and S. in the crop, under such agreements, acquired, by the assignments, as an incident thereof, the right to prosecute the defendant for not fencing according to his contracts, and to claim damages for injuries done by the animals of the defendant and others, to the crops while growing, in consequence of the non-repair of the fences.

APPEAL from a judgment entered upon a verdict, taken at the Ontario circuit in November, 1854, before T. R. Strong, justice. Upon the trial, the plaintiffs gave in evidence, that in June, 1851, one Winchester Merriam and the defendant agreed that the defendant would furnish 31 acres of land on his farm in West Bloomfield, in said county, to be sown to wheat that season by said Merriam; that each would furnish one half of the seed, that said Merriam should raise the crop and deliver to the defendant one half of the wheat, thrashed and measured; and that the defendant would repair and keep in repair the fences necessary to protect the crop from damage by cattle and other animals; it appearing that the fences were at that time

much out of repair. The plaintiffs also gave in evidence, that in the same month and year, one Hiram Shaddock made a contract with the defendant in all respects like that above stated, as to 15 acres of other land on said farm. The plaintiffs also proved that Merriam and Shaddock put in their respective portions of the wheat. That in March thereafter, the interest of said Merriam in the wheat growing, sown by him, was sold at auction, on an execution issued out of the supreme court, on a judgment duly entered in favor of Rufus Keeler against said Merriam, to Parmelee, one of the plaintiffs. That in February previous, the interest of said Shaddock in the wheat growing, sown by him, was sold at auction to Wiggins, the other plaintiff, on a chattel mortgage duly made and filed in the office of the town clerk of said town of West Bloomfield, made by said Shaddock to one Solon Peck. It appeared that the plaintiffs, after purchasing, agreed to own said undivided interests in said two parcels of wheat, in common, and gave their joint notes therefor, soon after the last sale. The plaintiffs claimed that by virtue of their ownership of said Merriam's and Shaddock's interests in said wheat, acquired as aforesaid, the right to prosecute the defendant for not fencing according to his contracts, and to claim damages of him for injuries done by the animals of the defendant and others to the wheat while growing, occasioned by the non-repair of said fences, passed by assignment in law to said plaintiffs as an incident of the sales; and offered proof of such injuries. To such claim, and to such proof, the defendant objected, and the court overruled the objection, and the defendant excepted. The plaintiffs then proved that at sundry times after their said ownership had commenced, the sheep of the defendant and of others, and the cattle, swine and poultry of others, damaged the wheat while growing, and that the fences remained out of repair. Other facts appeared, and other questions arose upon the trial, which are not necessary to be here stated.

The jury found a verdict in favor of the plaintiffs for $116 damages, upon which judgment was entered, with costs.

A. Dann, for the appellant.

E. A. Hopkins, for the respondents.

By the Court, WELLES, J. The point principally insisted upon by the counsel for the appellant, upon the argument, was that the plaintiffs had not acquired title to the cause of action for which they recovered judgment. I have not been able to find a case parallel with this in its facts and circumstances, and yet it is difficult, I think, to distinguish it in principle from a class of cases quite numerous in the books. It is entirely clear that where a debt is assigned, the assignment carries with it all the collateral securities, held by the assignor, for its collection, although they are not mentioned or referred to in the assignment; upon the ground that in such cases the securities are incidents to the debt, which is the principal. Hence, where one holds a note or bond against another, secured by mortgage upon real or personal property, and afterwards assigns the bond or note, or a judgment recovered upon it, to a third person, without any reference to the mortgage, the assignment of the debt, whether in its original form, or merged in a judgment, carries with it the mortgage. (*Langdon v. Buel*, 9 *Wend.* 80.) So where A lent B a sum of money, which B borrowed for the use of himself and C, his partner, and which was used in the business of the partnership, and B gave A his individual note for the money, which note A afterwards sold and transferred to D, it was held that the assignment of the note carried with it all the rights and remedies which A had previous to the transfer, respecting the money loaned, among which was the right of action against B & C, as partners, to recover the money for whose use it was borrowed and applied. (*Rose* v. *Baker & Perkins*, 13 *Barb.* 230.)

The present case, I apprehend, should be determined the same as if Merriam and Shaddock had sold and assigned to the plaintiffs the wheat in the ground, with all their rights and interests appurtenant thereto. That would be the effect of the sheriff's sale, and the chattel mortgage sale. Among those

was the right to enter the defendant's land and premises and take off the wheat when ripe. That right would pass upon a simple sale of the wheat growing, as incident or accessary to the interest in the crop, under the agreement. The defendant by his agreements with Merriam and Shaddock, was bound to keep the fences in repair, and I incline to the opinion that it was a duty upon him, and rights were acquired by Merriam and Shaddock, the benefits of which were transferred to the plaintiffs by the same process which vested them with the title to the wheat. They were rights and duties incident exclusively, *quoad* the parties, to the crops of wheat, and by a severance of the one from the other, the incident would be destroyed.

Upon the whole, I think no rule of law has been violated, and that the judgment should be affirmed.

Ordered accordingly.

[Monroe General Term, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

23 464
26h 149

James H. Clark and William T. Clark, infants, by Ezekiel Clark, their guardian, *vs.* A. C. Montgomery and G. W. Malin.

In an action upon the official bond of a general guardian, brought against the principal and surety, in which a part of the breaches assigned are the fraudulent acts of the guardian in proceedings instituted by him for the sale of his wards' real estate, proceedings had before the surrogate for the removal of the guardian, and the judgment roll in an action brought by the wards against such guardian and others, in which action it was adjudged that the proceedings for the sale of the wards' real estate were fraudulent and void and were set aside, are not competent evidence against the surety, to prove the guardian's misconduct; the surety being neither a party nor a privy to those proceedings, and not being affected by them.

And where it appears, in such action upon the guardian's bond, that the legal costs of the previous action, brought against the guardian and others, together with an extra allowance, have been paid, the plaintiffs cannot recover the sums paid by them to their counsel in that action.

Nor can the plaintiffs in such action recover the costs of the proceedings before

he surrogate for the removal of the guardian; the bond given by the guardian not reaching or providing for such costs.

1 s the duty of the general guardian of an infant to provide for the support, naintenance and education of the infant out of his estate; notwithstanding he infant has a father living; provided the father is poor, and unable to support him. And for sums expended for that purpose the guardian should be llowed, on the settlement of his accounts.

THIS action was brought upon a bond dated March 2, 1850, given by the defendants, in the penalty of $6000, to the plaintiffs, who were infants under the age of twenty-one years. The condition of the bond, after reciting that the defendant Montgomery had applied to the surrogate of Yates county to be appointed general guardian of the plaintiffs, provided in substance and to the effect that in case the said Montgomery should be appointed such general guardian, and should faithfully and in all things discharge the duties of guardian to the plaintiffs, according to law, and should render a just and true account of all moneys and property which should be received by him as such guardian, and the application thereof, and of his general guardianship in all respects, to any court having cognizance thereof, when thereunto required, then the said bond was to be void, otherwise to remain in full force. This bond was duly approved by the surrogate and filed in his office on the day of its date, and Montgomery was thereupon appointed general guardian of the plaintiffs, and immediately entered upon the duties of his trust. The breaches assigned in the complaint were as follows: 1. That Montgomery, on or about the 12th day of November, 1851, combining and confederating with one John Gardner and one John Underwood to cheat and defraud the plaintiffs out of their right, title and interest in and to a farm of about 240 acres of land in the town of Jerusalem, Yates county, presented a petition to the supreme court of the state of New York, and by fraudulently concealing from the court the facts and circumstances in relation to the plaintiffs' rights and interests, in and to said farm, caused and procured an order of said court appointing him, the said Montgomery, special guardian of the plaintiffs for the purpose of selling

their right, title and interest in and to said farm, and caused and instituted such other fraudulent proceedings in the said supreme court, that by means thereof he obtained an order from said court authorizing and empowering him, the said Montgomery, to sell and convey the right, title and interest of the plaintiffs in and to said farm for less than $2200, in pursuance of which order the said Montgomery sold and conveyed all the right, title and interest of the plaintiffs in and to said farm to the said John Underwood, for less than $2200, when in fact such right, title and interest was worth $6600, which was well known to said Montgomery. That afterwards, and about the first of December 1851, proceedings were instituted in behalf of the plaintiffs, before the surrogate of Yates county, to remove the said Montgomery from his trust as such guardian, on account of his said misconduct and fraudulent acts. That such proceedings were continued before the said surrogate until about the 19th day of January, 1852, when the said Montgomery was, by an order of the said surrogate, removed from his trust as such general guardian of the plaintiffs, on account of his said misconduct and fraudulent acts, and the said surrogate then and there, in and by the said order, adjudged that the said Montgomery be personally charged with the costs and expenses of the proceedings for his removal, and that he pay the same in sixty days from the date of such order, which costs as liquidated by the surrogate, exceeded the sum of $150, no part whereof has been paid. That after the sale by Montgomery, of the plaintiffs' right and interest in said farm, and about January 1st, 1852, the plaintiffs, by their guardian, commenced an action in this court against Montgomery, Gardner and Underwood, for the purpose of setting aside the said proceedings for the sale of the plaintiffs' interest in said farm, and of having the deed from Montgomery to Underwood declared fraudulent and void, and for a reconveyance of said farm by Underwood to the plaintiffs; and that such proceedings were had in said action that it was adjudged and determined by said court that the order obtained by Montgomery, appointing him special guardian in the proceedings for the sale of said farm as aforesaid, was

fraudulently obtained, and said order and all subsequent proceedings thereon were adjudged fraudulent and void; and that the deed of Montgomery to Underwood was fraudulent and void; the roll of which judgment was duly filed in the office of the clerk of Yates county, on the 28th day of February, 1853. By reason of which false and fraudulent proceedings of said Montgomery, the plaintiffs have sustained damages, to $500, and have paid out $300 to counsel in their action to set aside said proceedings, and in and about their proceedings to remove Montgomery from his trust as guardian as aforesaid. That Montgomery has not accounted for his actings and doings as guardian, &c. That while he was acting as guardian for the plaintiffs, and before his removal, &c. he, the said Montgomery, received large sums of money for rents and profits of the plaintiffs' real estate, amounting to $350, which he had not accounted for.

The complaint prayed judgment that Montgomery account for the said rents and profits, and for all moneys received by him while such guardian, and that the plaintiffs have judgment against the defendants for any balance which might be found in the said Montgomery's hands; and that they might have judgment for three times the amount of the actual damages sustained by the plaintiffs in consequence of the said fraudulent actings and doings of the said Montgomery as their guardian in the sale of their interests in the said farm, including the costs and expenses of removing said Montgomery, as aforesaid, and of prosecuting said action, according to the provisions of the statute in such case made and provided, with the costs of this action.

The defendants appeared and put in their answers to the complaint, and the cause was referred to a sole referee, to take and state the accounts of said Montgomery as former general guardian of the plaintiffs, and to hear and decide the action. On the 25th of May 1855, the referee made a report by which he found that on the 2d of March, 1850, Montgomery was duly appointed by the surrogate of Yates county the general guardian of the plaintiffs, who were then infants, under the age of 14 years, and

that on the same day the defendants executed the bond as before stated, which was duly approved and filed, &c. That shortly after Montgomery's appointment as general guardian for the plaintiffs, he as such agreed to pay George S. Clark, the father of the plaintiffs, for boarding, clothing and schooling them, the sum of $100 per year each, by applying the rents and profits of their real estate to such payment, the excess thereof, over the amount of such rents and profits, to be applied upon a debt amounting to $500, then owing by said George S. Clark and his wife for services rendered by him for them in the final settlement of the estate of Rachel Malin, deceased; and that on the 7th day of October, 1850, one Peter Houghtaling, on Montgomery's written order as such guardian, delivered to said George S. Clark, grain and other farm produce, raised on the real estate belonging to the plaintiff James H. Clark, amounting in value to the sum of $51.25. That the proceedings for the sale of the plaintiffs' interest in the said farm, before mentioned, were instituted and completed as before stated, and an action subsequently commenced by the plaintiffs by their guardian against the said Montgomery, Gardner and Underwood, and judgment rendered therein, as before stated, with $277.81, costs and disbursements, of which $69.81 was for disbursements, and the remaining sum, $208, was for costs and extra allowance. That the defendants in that action appealed to the general term, where the judgment was affirmed with costs, which were adjusted by the clerk of Yates county, at $49.21, of which $4.21 was for disbursements. That the services of the plaintiffs' attorneys in said action, and on said appeal, were worth the sum of $300. That the sum of $277.81, costs and disbursements in said actions, and $49.21 costs and disbursements on the appeal, have been paid by Montgomery to the plaintiffs' attorneys. That proceedings were instituted before the surrogate of Yates county for the removal of Montgomery as guardian, upon which he was removed, as also hereinbefore set forth; and that he was made personally chargeable, and ordered to pay to the surrogate the costs and expenses of his removal, including the costs and expenses of the proctor for

the petitioners for such removal, amounting to $45.55, of which $33.55 was for disbursements and fees of officers, and $12 was for proctor's fees; and that the services of the plaintiffs' attorneys as proctors for the petitioners were worth the sum of $55.

The referee also reported that the plaintiffs were entitled to recover of the defendants for the costs and expenses of the proceedings before the surrogate for the removal of the defendant Montgomery from his trust as the guardian of the plaintiffs, the sum of $45.55. Also for the value of the services of the said plaintiffs' attorneys as proctors on such proceedings, over and above the sum of $12, allowed by the surrogate, the further sum of $43. Also for interest on said sums to the date of the report. That the plaintiffs were also entitled to recover of the defendants, for the value of the services of the plaintiffs' attorneys in the action in this court to set aside the deed to Underwood, of the plaintiffs' interest in the said estate, including their services on the said appeal, over and above the said sum of $258, costs, already paid by the defendant Montgomery to said plaintiffs' attorneys, the sum of $42.00. Also for interest thereon. That the plaintiffs were also entitled to recover of the defendants for the balance in the hands of Montgomery as former general guardian of the plaintiffs, the sum of $166.25, and interest; and that the plaintiffs should have judgment against the defendant for the sum of $360.85, besides costs.

Judgment was entered upon this report, in favor of the plaintiffs, against the defendants, for the above amount of $360.85, with $79.10 costs.

The defendants made a case containing all the evidence and other proceedings on the trial before the referee, which are sufficiently stated in the opinion of the court.

D. Rumsey, for the defendants.

D. B. Prosser, for the plaintiffs.

By the Court, WELLES, J. It appears by the case that the referee received in evidence the petition to the surrogate,

and proceedings founded thereon, with the order of the surrogate for the removal of Montgomery as general guardian of the plaintiffs. This evidence was offered for the purpose of proving, as stated by the counsel for the plaintiffs, that Montgomery acted fraudulently in the sale of the plaintiffs' lands, as alleged in the complaint, and for the purpose of proving his actual removal as such guardian; which was objected to by the defendants' counsel in due time and in proper form. It also appears in like manner that the referee received in evidence the judgment roll in the action brought by the plaintiffs, in this court, against Montgomery, Gardner and Underwood, in which action it was adjudged that the proceedings for the sale of the plaintiffs' interests in the farm mentioned were fraudulent and void and were set aside, and Underwood, the grantee of the farm under those proceedings, was ordered to reconvey the farm to the plaintiffs. The counsel for the plaintiffs offered to read this judgment roll in evidence, as the case states, to prove, 1st. The fact of the removal of Montgomery as general guardian of the infant plaintiffs. 2d. To prove the sale of the real estate, as alleged in the complaint. 3d. To prove that Montgomery, in procuring and making such sale, as the guardian of said infants, acted fraudulently. The defendants' counsel, in due time and in proper form, objected to the evidence. This evidence was undoubtedly competent and proper as against the defendant Montgomery, but it did not prove any thing against the defendant Malin, for the reason that the damages to the plaintiffs arising out of the improper conduct of Montgomery, as charged in the complaint, was not embraced within his liability as surety upon Montgomery's official bond as guardian. A portion of the breaches of the condition of the bond assigned in the complaint, are the fraudulent acts of Montgomery in the part he took in the proceedings to procure the sale of the interest of the plaintiffs in the farm mentioned; and assuming that the condition of the bond embraced and was intended to provide against the wrongful and fraudulent conduct of Montgomery, the proceedings before the surrogate for his removal, and the judgment roll in

the action against him and Gardner and Underwood were incompetent evidence against Malin to prove Montgomery's mis conduct. Malin was neither a party or privy to those proceedings, and is not to be affected by them. (*Douglass* v. *Howland*, 24 *Wend.* 35 *to* 58, *&c. and authorities there cited. Coan* v. *Osgood*, 15 *Barb.* 583, *and authorities there cited.*)

The foregoing proceedings before the surrogate, and the judgment roll in the action in this court, mentioned and set forth in the case, was all the evidence before the referee tending to prove the misconduct of Montgomery as guardian. It follows, therefore, that the report, as respects the defendant Malin, in this particular, was unsupported by any legal evidence whatever, as there is no evidence that he had any notice of the proceedings before the surrogate, or of the commencement of the action, so as to enable him to make a defense; even if a notice would have so far connected him with the proceedings and the action as to affect him by their results.

But admitting that the judgment roll was properly received, and the charge of Montgomery's fraudulent conduct thereby established, the evidence detailed in the case, as well as the report of the referee, show that all the legal costs of that action, together with an extra allowance by the court, have been paid; and the plaintiff is not at liberty now to come and claim that the law had not given him sufficient compensation, and ask the court to compel the surety, nor even the principal, to make up the balance.

In respect to the costs before the surrogate, on the proceedings for the removal of Montgomery as general guardian, the bond does not reach or provide for them. The condition of the bond was that Montgomery should faithfully and in all things discharge the duties of general guardian to the plaintiffs, according to law, and should render a just and true account of all moneys and property which should be received by him as such guardian, and the application thereof, and of his general guardianship in all respects, to any court having cognizance thereof, when thereunto required. The costs of removing him did not

appertain or relate to his doings or conduct as guardian, and were not within the liability of the surety on his bond; and if they were, the extra counsel fees allowed by the referee were entirely unwarranted by law.

It also appears to us that the referee should have made an allowance to Montgomery for boarding, clothing and schooling the plaintiffs while they were with their father, under the contract between them, as reported by the referee, as is shown by the evidence. This contract was entered into shortly after the appointment of Montgomery as the plaintiffs' general guardian, and they continued with their father under it for nearly two years, and for which no allowance has been made by the referee. It was objected to, before the referee, on the ground that Clark, the father of the plaintiffs, was bound by law to maintain, support and educate the plaintiffs out of his own means. That is so, under certain circumstances and as between persons standing in certain relations to each other. But it is the primary duty of the general guardian of an infant to provide for its support maintenance and education. He stands *in loco parentis* to his ward, and is entitled to his custody and to direct his education, &c. (2 *R. S.* 150, §§ 1, 2, 3. *Id.* 151, § 9.) It is unusual for the surrogate to appoint a general guardian for an infant having a father, yet it may be, and sometimes is, done; and then the guardian succeeds to the rights and duties of the father, subject to the authority and discretion of a court of equity. In the present case the presumption is that there was good cause for the appointment; and it was in all respects valid until the guardian was removed. It is also to be presumed that the arrangement between Montgomery and the parents of the plaintiffs, for their boarding, clothing and schooling, was a reasonable and proper one, until something is shown to the contrary; and should be treated as valid, and upheld accordingly. The evidence shows that the father was poor, and the farm of the plaintiffs was their separate property. Under such circumstances we can see nothing improper in the guardian paying for their support and education out of their separate estate.

We think the judgment should be reversed, the report set aside and a new trial granted, with costs to abide the event.

Judgment accordingly.

[Monroe General Term, December 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

Hammond *vs.* Zehner.

23 473
35 329

In an action to recover damages for the flowing of lands by means of a mill dam, the defendant proved that his dam had been erected upwards of twenty years, and that he, and those under whom he claimed, had been in the actual possession of the dam, &c. for upwards of twenty years, for the purpose of supplying grist mills, and that the dam had been kept up at its present height. *Held*, that this evidence, in the absence of any proof by the plaintiff, to rebut it by showing that the defendant's occupation, and setting back of the water, was by leave or license or without claim of right, was sufficient to authorize the jury to imply a grant of the easement, from some person authorized to make it, and to justify a verdict for the defendant.

The burden of proving an adverse possession is on the party claiming the easement. But the use of an easement for 20 years, unexplained, will be presumed to be under a claim or assertion of right, and adverse, and not by leave or favor of the owner.

The time for the enjoyment of an incorporeal hereditament to ripen into a title by prescription, has been fixed, in this state, in analogy with the period limited by the statute for the right of entry upon land, viz. 20 years.

APPEAL by the plaintiff, from an order made at a special term, denying a motion for a new trial. The complaint alleged that before and at the time of the commencement of the action, the plaintiff was the owner and in possession of certain lands in the towns of Sparta and West Sparta, in the county of Livingston, and which were described in the complaint; that the defendant erected a dam across the Canaseraga creek, below the lands of the plaintiff, and continued the same for the space of seventeen years before the commencement of the action, by means of which the waters of the creek were prevented from

flowing off in the natural channel, and were thrown back upon, and caused to flow over and remain upon the lands of the plaintiff, to the injury of the land, and of the grass, grain and timber growing thereon, and claiming damages to the amount of one thousand dollars. The answer of the defendant contained, 1st. A general denial of the complaint. 2d. An allegation that the said creek was on the first day of January, 1820, a public highway and has been ever since; that by an act of the legislature of the state of New York, passed April 11th, 1820, one Isaac Havens was authorized to construct a dam across said creek, at the point where the dam complained of was erected, not to exceed three feet in height; and that said Havens, in the summer and fall of 1826, erected said dam, and the same has ever since been maintained by said Havens and the defendant at no greater height than three feet, in pursuance of said act; that the said Havens, on the 5th day of July, 1831, being the owner in fee simple of the land on which the dam was erected, and also of land on which a grist mill was erected, conveyed to the defendant the grist mill and appurtenances, in fee simple, and leased to him the land on which the dam and the race leading therefrom to said grist mill were situated, so long as the same should be necessary or wanted for the use of said mill; that the defendant had been the owner and continued in possession of said mill and dam ever since said conveyance, and had not raised the dam or the water therein, and that neither the defendant or his grantor, had ever raised the dam to a greater height than that at which it was first erected. 3d. That for more than twenty years before the commencement of the action, the defendant and his grantor had owned and been in the actual possession of the dam and appurtenances, and that during said twenty years, neither the defendant nor his grantor had raised the dam, or increased the water therein.

On the trial, at the Livingston circuit, in May, 1854, before Justice Welles, the plaintiff proved his title to, and possession of the premises alleged to have been overflowed, and the setting back of the water upon the same by means of the defendant's mill dam across the Canaseraga creek. The defendant proved

the facts set forth in his answer. After the testimony was closed, the counsel for the plaintiff requested the circuit judge to charge the jury that if they were satisfied that the dam caused the water to overflow and injure the lands of the plaintiff, he was entitled to recover his damages notwithstanding the claim of right by the defendant to flow the said lands. The judge declined so to charge, and the counsel for the plaintiff excepted. The circuit judge charged the jury that if the defendant and his grantor had used and occupied the premises as they were then for twenty years before the commencement of this action, the jury might presume a grant from some person authorized to make it, and should find a verdict for the defendant. To which charge the counsel for the plaintiff also excepted.

The jury found a verdict for the defendant.

J. L. Endress, for the plaintiff.

John Wilkinson, for the defendant.

By the Court, E. DARWIN SMITH, J. The defendant claims an easement in the plaintiff's land. He claims a right to flow such lands for the use of his mill, which is supplied with water by means of a dam which the defendant and his grantors had kept up and maintained at its present height for about 25 years before the commencement of this suit. An easement is an incorporeal right, which may be acquired by grant or by acquiescence and use, upon the presumption of a grant, which by the common law is termed title by prescription. As prescription always presupposes a grant made beyond the period of legal memory, and lost, the acquiescence and use requisite to create or ripen into a title must be continued for a period sufficient to bar an action of ejectment, which in this state, since the statute of limitations passed April 8, 1800, has been, and now is, twenty years, except when brought as a substitute for a writ of right. It must be continued, uninterrupted and adverse. In *Tyler* v. *Wilkinson*, (4 *Mason's C. C. R.* 402,) Judge Story says: "By our laws, upon principles of public convenience, the term of twenty

years exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right." But this enjoyment must not be by license, leave or favor, but upon claim of right. (17 *Wend.* 564. 19 *id.* 309. 24 *Pick.* 106. 8 *Barb.* 155. 2 *Kernan*, 381.)

There is no doubt or dispute that upon the evidence in this case the defendant's dam had been erected and used over 20 years before the commencement of this suit. The plaintiff's counsel claims, however, that the defendant shows no right to flow his land, upon the ground that the dam has been erected and maintained for that time at its present height; that maintaining the dam does not imply a right, or a claim of right, to set back the water on to his land. The defendant proved his answer, or most of it, and though the answer might have been deemed insufficient as a pleading, yet if upon full proof of it the jury would be justified in finding for the defendant, the judge was right in receiving the evidence. The answer merely sets up the facts, or the evidence of facts, rather than the proper legal conclusion from those facts. The facts stated in the answer were proper for the jury, and it was for them to draw the proper conclusions from them. The answer states that the dam had been erected upwards of twenty years, and that the defendant and those under whom he claimed had been in the actual and peaceable possession and occupancy of the dam and its appurtenances for upwards of twenty years, for the purpose of supplying the defendant's grist mills, and that the dam had been kept up at its present height. And these facts were proved. Upon this evidence, and unless some proof was given by the plaintiff to rebut it, by showing that the defendant's occupation so far as relates to flow of the water raised by the dam upon his land, was by leave or license or without claim of right, was sufficient to authorize the jury to imply a grant of the easement. The question was for the jury, upon the evidence. The burden of proving an adverse possession is on the party claiming the easement. But the use of an easement 20 years, unexplained, will be presumed to be under a claim or assertion of right and adverse, and not by leave or favor of the owner. (3 *Kent*, 442.

3 *East*, 297, 300. 14 *Mass. R.* 53. 3 *Bing.* 115.) If a party claiming the easement shows an open and uninterrupted enjoyment for twenty years, as the defendant did here of the dam which involved the back flow of the water on to the plaintiff's land, proof must come from the other side to show that such use of the defendant's land was by license or permission, or that it was restrained or limited in point of time. (*Finch* v. *Patridge*, 2 *Verm. R.* 391. *Cross* v. *Lewis*, 2 *B. & Cress.* 686. 8 *Barb.* 155. 19 *Wend.* 366.) There being no proof in this case to rebut the presumption of a grant arising from the 20 years' uninterrupted use of the easement, the charge of the judge, in view of the facts of the case, that they might presume a grant from some person authorized to make it, and should find a verdict for the defendant, was right. In advising them that they should find a verdict for the defendant, the judge merely advised them in effect that the legal presumption, upon the evidence, unexplained, was in favor of the defendant's title by prescription, as claimed. The jury would not have been warranted, upon the evidence, in finding a verdict for the plaintiff, and we should have been bound to set aside their verdict as against the evidence, if they had done so.

But the plaintiff's counsel claims that prescription, when the defendant claims as part of his time the possession of a grantor who took possession before the revised statutes, must be 25 years. The time of legal memory in Massachusetts is fixed in analogy to the time prescribed for bringing a writ of right. (*Melvin* v. *Whiting*, 10 *Pick.* 295. *Kent* v. *Wait*, *Id.* 138.) But such has never been the rule in this state. The time for the enjoyment of an incorporeal hereditament to ripen a title by prescription has been fixed in this state in analogy with the period limited by the statute for the right of entry upon land, which was 20 years, in the statute of limitations passed April 8, 1801. (*See Rev. Laws of* 1813, *p.* 185, § 3.) The rule was thus applied, before the revised statutes, to cases of flowing lands in mill dam cases, just like this, in *Stiles* v. *Hooker*, (7 *Cowen*, 266.) and *Russell* v. *Scott*, (9 *id.* 279.) In the case in 7 *Cowen*, Judge Savage states the rule as above. He says: "A

grant is presumed from 20 years uninterrupted use of water at a certain height." The case, I think, upon the whole, was rightly disposed of at the circuit, and the judgment of the special term should be affirmed.

[MONROE GENERAL TERM, December 1, 1856. *T. R. Strong, Welles* and *Smith*, Justices.]

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23 478
43 446
36h 63
38a 99
64a 467

LUCIUS N. BANGS, receiver, &c. *vs.* C. MOSHER and J. MOSHER, impleaded with I. M. SCHERMERHORN.

Where a creditor takes the draft or check of the principal debtor, payable at a future day, in payment of the debt, this is a valid extension of credit, and if done without the consent of the sureties, discharges them from all liability.

The legal effect of such a transaction is to suspend the right of action against the principal debtor, until after the maturity of the draft, and until default has been made in its payment.

APPEAL from a judgment rendered at the Genesee circuit in October, 1854, before Mr. Justice GREENE. The action was tried by the court, without a jury, and judgment rendered in favor of the plaintiff. On the trial, a stipulation was read in evidence, signed by the attorneys for the respective parties, by which the following facts were admitted: 1. That the Genesee Mutual Insurance Company is a corporation duly organized under an act of the legislature of the state of New York, passed May 3, 1836, and having its place of business at Le Roy in the county of Genesee. 2. That the defendant, Isaac M. Schermerhorn, was, on or about the 10th day of May, 1851, appointed an agent of said corporation, to collect from certain members of said corporation, residing in the county of Ontario, certain sums of money then due and payable to said corporation, upon an assessment then recently made by said corporation upon the notes of such members. 3. That before such appointment and on the said 10th day of May, 1851, the said Isaac M

Schermerhorn, as principal, and the said John Mosher and Charles Mosher as his sureties, executed and delivered to the said corporation their joint and several bond in the penalty of $3000, conditioned that the said Isaac M. Schermerhorn should well and faithfully perform the duties of such collector, and should from time to time remit and pay over to said corporation all money which he should collect as such collector as aforesaid; the execution and delivery of which bond is fully admitted. 4. That the said Isaac M. Schermerhorn, on or about the 22d day of November, 1851, accounted with the said corporation, when there was found to be a balance due from him as such collector to said corporation, of the money mentioned in said bond and collected by him before that time as such collector, amounting to $797.19. 5. That thereupon, the said Isaac M. Schermerhorn made and delivered to said plaintiff as such receiver as aforesaid, his check, draft or order on the Ontario Bank at Canandaigua, in the words and figures following, to wit:

"Canandaigua. 22d Nov. 1851.

Cashier of the Ontario Bank, pay to L. N. Bangs, receiver of the Genesee Mutual Insurance Company, or order, seven hundred and ninety-seven $\frac{1}{100}$ dollars, on the 5th day of Dec. next.

(Signed) ISAAC SCHERMERHORN."

6. That the said Schermerhorn received, on the execution and delivery of the said check, a statement of his account and balance, and a receipt in the following words, viz: "Rec'd of Isaac M. Schermerhorn, Nov. 22d, 1851, check on Ontario Bank for seven hundred and ninety-seven $\frac{1}{100}$ dollars, payable 5th Dec. 1851, in payment of above balance.

(Signed) I. SUMMERFIELD,
Agent of the Genesee M. Ins. Co."

And that the money mentioned in the check had not since been paid to the plaintiff, or any part thereof, and that said check was still the property of the plaintiff, as such receiver as aforesaid. And it was further admitted that said check was deposited in the Genesee County Bank at Le Roy, for collection, and was forwarded to the Ontario Bank at Canandaigua, where the

same was payable, and that on receipt thereof at Canandaigua, on the day after it was payable, it was duly presented to the said Ontario Bank at its place of business, and payment thereof demanded, which was refused by the said bank, upon the ground that the drawer had no funds in said bank; and that on the same day, said Schermerhorn was informed of such demand and refusal, and payment was then and there demanded of said Schermerhorn, which was refused. And it was further admitted that the drawer of said check had no funds in said bank at the time of the presentation of the said check for payment, or at any intermediate period, and that he had no deposit of moneys and kept no account at said bank. It was further admitted that said check and receipt were given without the knowledge of said defendants, Charles Mosher and John Mosher.

It appeared that the plaintiff had by an order of the supreme court been appointed receiver of the property and effects of the Genesee Mutual Insurance Company, and that he took possession of the effects of the company on the 7th day of October, 1851. It was also proved that I. Summerfield who signed the receipt set forth in the stipulation, transacted business as the agent of the plaintiff as receiver. Other facts appeared upon the trial, but the foregoing are sufficient for the understanding of the question decided by this court.

After the plaintiff had rested, the defendants' counsel moved for a nonsuit upon several grounds, the third of which was that. "taking the draft or check of Schermerhorn the principal debtor, payable upon time, in payment of the balance in his hands, was a valid extension of credit, and discharged the sureties from all liability." The motion for a nonsuit was denied, and the counsel for the defendants, the Moshers, excepted. The justice holding the circuit ordered judgment against the defendants for $967.95, for which sum judgment was entered with costs.

Jas. C. Smith, for the appellants.

S. Mathews, for the respondents.

By the Court, WELLES, J. The draft or check of Schermerhorn, upon the Ontario Bank, was received by Summerfield in payment of the demand in question. This expressly appears on the face of the receipt; and no attempt has been made, to show by evidence, that any intention existed to receive it otherwise than as payment—if, indeed, such evidence would have been admissible—or to show any fraud on the part of Schermerhorn. The draft was negotiable and payable on time. It was, in legal effect, an inland bill of exchange. The effect of the transaction was, at least, to suspend the right of action of the insurance company against Schermerhorn, the principal debtor, until after the maturity of the draft, and until default had been made in its payment. (*Tobey* v. *Barber*, 5 *John.* 73.) And it operated to discharge the defendants, the Moshers, who were only sureties and who had no knowledge of the arrangement, and of course did not consent to it. There is no ground for saying the draft was taken as collateral. It was *sub modo*, a payment, and the insurance company could not afterwards call on the drawer, until after he had made default in the payment of the draft.

We think the well settled rule of law that where a creditor, by a valid agreement with his principal debtor, extends the time of payment of the debt without the consent of the surety, the latter is discharged, applies in full force to this case. The objection that the obligation of the defendants was by specialty, and that therefore its terms could not be changed by a parol agreement, is unfounded. The time of performance specified in a sealed agreement may be extended by parol. This is too well settled to require authorities to prove.

The judgment should be reversed, and a new trial granted; with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

23 482
49 121
15h 66
36h 433

COREY and wife *vs.* THE BUFFALO, CORNING AND NEW YORK RAIL ROAD COMPANY.

Where land has been dedicated by the owner, to the public, for a street or highway, the title, for the time being, is in the people of the state; and if the people, through the legislature, authorizes the construction of a rail road through such street or highway, and the road is constructed accordingly, in a seasonable and proper manner, if the owners of property upon such street suffer loss or damage in consequence of the construction of the rail road, it is *damnum absque injuria.*

In an action against a rail road company to recover damages for raising an embankment in front of the plaintiffs' premises, and obstructing the access to the same &c., by constructing its road through a public street in a village, the judge charged the jury that if the defendants had restored the street to its former state, or to such state as not unnecessarily to impair its usefulness, the plaintiffs were not entitled to recover; and that in determining that question they were to allow the defendants such use and occupancy of the street as was necessary for the construction and maintenance of their road in a proper manner within the rule stated; but that if the defendants did not restore the street to its former state, or to such state as not unnecessarily to impair its usefulness, and by reason thereof, the plaintiffs had been injured &c., they were entitled to recover; *Held* that the charge was not erroneous.

MOTION by the plaintiffs for a new trial, on a bill of exceptions. The motion was ordered to be first heard at the general term. The first count of the complaint alleged that the plaintiff Caroline Corey, on the 3d day of June, 1850, was the owner in fee, and lawfully possessed, of a certain lot of land situated in the village of Painted Post, in the town of Erwin in the county of Steuben, being village lot number 22 in the village plot laid out by Francis E. Erwin, and as surveyed and delineated in a map by Michael R. Tharp, and bounded on the north by Chemung street and fronting thereon forty feet; on the east by village lot number 21; on the south by an alley, and on the west by lot number 23; and that she was such owner and in such possession at the commencement of this action. That the defendants, on or about the 1st of January, 1851, wrongfully and unlawfully, and without the license, consent or permission of the plaintiffs, entered upon the land aforesaid with the appurtenances, with horses, cattle, carts, wagons and other carriages, and crushed, damaged and spoiled the grass, and tore up, sub-

verted, damaged and spoiled the earth and soil, and also cast and threw divers large quantities of earth, stones, wood, iron and rubbish upon said premises and appurtenances, and into ditches upon and belonging to the same, and thereby encumbered, damaged and injured said premises, and choked and filled up said ditches and hindered and prevented the plaintiff Caroline from having the use, benefit and enjoyment of the premises and the buildings thereon in so large and ample a manner as she might and would have done, to her damage of $500.

The second count stated that the defendants wrongfully, &c. constructed and put along, through, and upon Chemung street aforesaid, a public highway, in front of and adjacent to the said lot, their rail road, and in the construction and building thereof, raised an enbankment of earth nearly the whole width of the street, and removed and obstructed the walks adjacent to and in front of said premises, and filled up and choked the gutters, ditches and drains in said street, and caused the water to flow upon and inundate the premises, at various times from the 1st of January, 1851, to the commencement of the action, and caused the water to run into and fill up the cellar, by which the property therein was damaged and destroyed, and the walls and em bankments of the house damaged to the amount of $100—and destroyed the crops growing on said premises of like amount—and caused the water to remain and stand in stagnant pools on said premises, and that the water became stagnant and offensive; and that by reason thereof the dwelling house became unwholesome and uncomfortable and unfit for habitation, and that the plaintiff Caroline had been obliged, in ventilating, draining and cleansing the house and premises, to expend $200.

The third count stated that the defendants wrongfully &c. caused to be run on their said road, across and upon the said premises and through and upon said Chemung street, their cars and locomotives, thereby depriving said plaintiff Caroline of the enjoyment, use and possession of said premises and appurtenances and of the highway, and appropriating to their own use the highway, and by the construction of their rail road and running the cars and locomotives thereon had caused the property to be

depreciated in value and caused great annoyance and inconvenience to the plaintiff Caroline, her family and agents, in the matter of ingress and egress to and from and upon the premises and the use and enjoyment of the same; and demanded judgment for $1500 and costs.

The defendants' answer 1. Denied the complaint. 2. Alleged that the defendants were a corporation, &c.; that Chemung street was a public highway, and that the title to the land in said street was vested in the people of this state; and that the defendants, in pursuance of their organization and act of incorporation, entered upon said street and constructed their said road, which are the wrongs and injuries &c. 3. Set up leave and license of the plaintiffs.

On the trial, at the Steuben circuit held in November, 1854, before Mr. Justice JOHNSON, the plaintiffs proved the organization of the defendants under the general rail road act passed April 2, 1850, by the name of the "Conhocton Valley Railway Company;" also the act passed March 3, 1852, changing the name of said company to that of the defendants. The plaintiffs also gave evidence tending to show that in 1850 they lived in a house situated on Chemung street, in the village of Painted Post in the county of Steuben, and that said house was owned by the plaintiff Caroline Corey, and fronted on said Chemung street, with a front door yard four feet wide. That the street was four rods wide. That the defendants had built their rail road through said street and about the center thereof, and in front of the plaintiffs' dwelling. That they commenced laying their track in 1851, and had since completed and were running their road. That in consequence of the construction of the defendants' rail road, the water, which before the construction, ran off into the Conhocton river, at times since the rail road was constructed, stood in pools upon and soaked into the land upon the lot in question, thereby injuring the land and rendering it of less value. That the rail road along this street in front of the plaintiffs' lot is upon an embankment raised by the defendants some two feet above the natural surface, and renders access to the plaintiffs' house from the street troublesome and

difficult. There was much evidence given of the same general character, upon which the plaintiffs claimed they had sustained material damage. In the course of the trial the plaintiffs offered to show that the damages sustained by them in consequence of the obstruction to their facilities of egress and regress upon and from the premises was by reason of the building of the embankment by the defendants. This was objected to by the defendants' counsel, and the objection was sustained by the court, "unless it is shown that the street is not restored to its former usefulness, or that its former usefulness is unnecessarily impaired in the construction of the road," to which decision the plaintiffs' counsel excepted. Two other offers were made, on behalf of the plaintiffs, of evidence of injuries by reason of the embankment, which were objected to by the defendants' counsel, and like rulings and decisions made by the court as in the case of the last offer, and exceptions taken by the plaintiffs' counsel. The plaintiffs also offered to show that by reason of the defendants' rail road being constructed along and upon Chemung street, and operated by their locomotives and cars, the plaintiffs had been deprived of the full and complete enjoyment of the said lot and dwelling house, both in the particulars of egress and ingress and in the obstruction of the natural flow of water from and off said premises and the highway in front thereof; that the premises were thereby depreciated in value, and the amount of such depreciation; to which the defendants' counsel objected, that the defendants for such cause and for such damages were not liable; and the objection was sustained; to which decision the plaintiffs' counsel excepted.

After the plaintiffs had rested, the defendants introduced evidence in relation to the manner in which their rail road was constructed, the width of the same, the width and height of the embankment opposite the plaintiffs' premises, &c. The defendants also gave evidence showing that in 1840 Francis E. Erwin, who was then the owner of the land embracing the premises in question, caused that part of Painted Post village to be laid out and surveyed into village lots and streets, including the plaintiffs' lot and Chemung street, caused a map to be made of

said lots and streets, and sold lots bounded on said streets, and among others the lot of the plaintiffs in question, and that Chemung street, through which a portion of the defendants' rail road runs, had been used and occupied as a public street or highway ever since. After the evidence was closed, the justice, among other things, charged the jury, that the principal question for them to consider was, whether the defendants, in the building and constructing of their road through Chemung street, had restored the street to its former state, or to such state as not unnecessarily to impair its usefulness; that if the jury from the evidence should find that they had so restored the street, the plaintiffs could not recover; and in determining this question, they were to assume and allow to the defendants such use and occupancy of the street as should be necessary for the construction and maintenance of their road in a proper manner, within the rule laid down. That if the jury should find from the evidence that the defendants did not restore the street to its former state, or to such state as not unnecessarily to impair its usefulness, and that by reason thereof the plaintiffs had been injured in the depreciation of the value of the yearly rents and profits of their said premises, they were only entitled to recover the amount of the depreciation during the period that had elapsed between the commencement of such injury and the commencement of this action. The plaintiffs' counsel duly and specifically excepted to the foregoing instructions to the jury and requested the said justice to charge the jury as follows: 1st. That if, in the construction of this rail road through Chemung street, the defendants had raised an embankment by which the plaintiffs were obstructed in passing to and from their premises adjacent to and upon said street, the plaintiffs were entitled to recover the damages thereby sustained. 2d. That if in such construction of said rail road, the defendants built an embankment in the street, by means whereof the plaintiffs were deprived of the use, benefit or advantage of the street, the defendants were liable in this action. 3d. That if in the construction of said rail road along Chemung street, the defendants had built an embankment, by reason of which the messuage of the plain

tiff was liable to be, or was flooded with water, or otherwise injured by reason of the embankment preventing the natural flow of the water from said premises, or causing water to accumulate thereon, the defendants were liable for the damages. 4th. That the plaintiff Mrs. Corey, being the owner of land adjacent to Chemung street, had, at the time the defendants built their rail road, as an essential incident to her title, the right of free and unobstructed passage into and upon the street from her adjacent land; and if the defendants, by the building of their rail road along Chemung street, had deprived her of this right, they were liable for the damages, in this action.

The said justice declined to charge the jury as requested in the foregoing four propositions respectively, and the plaintiffs' counsel duly and specifically excepted to such refusals respectively. The jury returned a verdict for the defendants.

W. Irvine, for the plaintiffs.

W. Barnes, for the defendants.

By the Court, WELLES, J. The defendants were incorporated under the act entitled "An act to authorize the formation of rail road corporations and to regulate the same," passed April 2, 1850. (*Sess. Laws of* 1850, *ch.* 140, *p.* 211.) The 28th section of that act declares the powers of corporations formed under it, in addition to those conferred on corporations by title 3, chap. 18 of the first part of the revised statutes. The fifth subdivision of the section of the general rail road act referred to, provides that every such corporation shall have power "to construct their road across, along, or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch; but the company shall restore the stream or water course, street, highway, plank road and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness."

The charge of the judge to the jury was, in substance, that

if the defendants, in constructing their rail road through Che mung street, had restored the street to its former state or to such state as not unnecessarily to impair its usefulness, the plaintiffs were not entitled to recover; and that in determining this question, they were to allow the defendants such use and occupancy of the street as should be necessary for the construction and maintenance of their road in a proper manner within the rule stated; and that if the defendants did not restore the street to its former state, or to such state as not unnecessarily to impair its usefulness, and that by reason thereof, the plaintiffs had been injured, &c. they were entitled to recover.

It will be seen that the plaintiffs' right to recover was made to depend upon the fact that the defendants neglected to restore the street, &c. as before stated, which last, the justice explained to mean, that if, in constructing and maintaining their rail road in a proper manner, the defendants failed to restore the street to its former state, &c. they would be exempt from liability, provided that in so doing they impaired its usefulness no more than was necessary to such construction and maintenance. If these instructions were correct, it follows that the justice properly declined instructing the jury as requested by the plaintiffs' counsel, and also in the exclusion of evidence offered by the plaintiffs, as stated in the case. And it is immaterial whether the rule of damages laid down in the charge, in the event of the jury finding for the plaintiffs, was correct or not; because, if the ruling was correct upon the question of the plaintiffs' right to recover at all, the jury having found for the defendants, could not have reached the question of damages in their consideration of the case. The plaintiffs, in such case, could not be injured by any supposed error in the rule of damages.

Upon the question of the plaintiffs' right to recover at all, we think the rule stated by the justice in the charge was unobjectionable, and was in conformity with the law, as settled by our highest judicial tribunal. The question whether the defendants would have been liable for damages, either direct or consequential, resulting from their *carelessness* or *negligence* in constructing or operating their rail road, was not decided by the

justice at the circuit, nor he was he called upon to instruct the jury on that subject. But the ground was then, and is now taken by the plaintiffs' counsel, that the defendants had not the legal right to construct their rail road at all through the street in question, no matter with how much care, and notwithstanding they had conformed to the provisions of the act referred to, and could not do so without being responsible to the plaintiffs for any damage they may have sustained in consequence thereof. Such position we think cannot be maintained. The street was a public highway, in which the plaintiffs never had any title or interest, except as an easement in common with the public at large. Having been dedicated by the owner for the use of a public street or highway, the title for the time being was in the people of the state. The people, through their legislature, had authorized the construction of this road, and if the plaintiffs or any other persons have suffered loss or damage in consequence of its reasonable and proper construction, it is *damnum absque injuria.*

It is unnecessary to discuss this question, as the law is fully and elaborately examined and considered in the case of *Radcliff's Executors* v. *The Mayor &c. of Brooklyn*, (4 *Comst.* 195,) and again in *Gould* v. *Hud. Riv. R. R. Co.* (2 *Seld.* 522.) We think the principles recognized in those cases are applicable to and must govern this. There are adjudged cases to be found which seem to favor the plaintiffs' views; but they will all be found, we think, either to be distinguishable from those above cited, and from the present case, or to have been, in effect, overruled by subsequent cases of higher authority.

In the case of the *Presb. So. of Waterloo* v. *The Auburn and Roch. R. R. Co.* (3 *Hill*, 567,) the acts complained of were the entering upon the plaintiffs' premises and digging up the soil, &c. and although the premises in question there were a public highway, yet the plaintiffs' title was only affected by that circumtances, in being made subject to the easement of the public, as a highway, and could not be taken by the defendants for the use of their road, without prepayment of damages.

The case of *Fletcher* v. *The Auburn and Syr. R. R. Co.* (25 *Wend.* 462,) was very much like the present, and if sound law, a strong authority for the plaintiffs. But it is impossible to reconcile it with the principles settled in the cases cited, decided by the court of appeals. It is in terms disapproved in the case of *Radcliff's Ex'rs* v. *Mayor &c. of Brooklyn.*

The case of *Brown and others* v. *The Cayuga and Susquehanna R. R. Co.* (2 *Kernan*, 486,) turned upon the construction of the act incorporating the defendants in that case, which was essentially different in respect to the question under consideration, from the general rail road act of 1850, under which the defendants in this case were incorporated. No intimation is given by the judge who gave the prevailing opinion, and in which a majority of the members of the court concurred, of any intention to depart from the principles announced in the two other cases referred to, decided in the court of appeals. The three above mentioned cases from 25*th Wend.*, 3*d Hill* and 2*d Kernan*, were cited and relied upon in the present case by the counsel for the plaintiffs. We think, however, they do not avail them in the present case.

The motion for a new trial is therefore denied, and judgment ordered for the defendant upon the verdict.

[Monroe General Term, December 1, 1856. *T. R. Strong*, *Welles* and *Smith*, Justices.]

23 490
21a 343
37a 160

Kortright *vs.* Cady and others.

An answer, alleging that on &c., the defendant tendered to the plaintiff's attorney the principal, interest and costs then due, without averring a readiness still to pay the same, or that the amount is paid into court, or offering to bring it into court, is defective.

An averment of a present readiness to pay, is an essential part of a plea of tender.

It is also essential to a perfect tender that the party should not only once offer the money, but that he should be always ready to pay it; so that a prior or subse-

quest demand and a refusal to pay, is a good replication to the plea of tender, and makes the tender a nullity.

A tender of the amount due upon a mortgage, made after the day on which the mortgage money becomes payable, and after a foreclosure suit has been commenced, will not discharge the lien of the mortgage, so as to bar the bill for foreclosure.

Taxes assessed upon mortgaged premises are a lien thereon, and when paid by the mortgagee, they cannot be deemed to have been paid in reliance merely on the personal liability of the mortgagor, but in his character of mortgagee and with a view to transfer the lien from the estate to the mortgagee. In other words, the payment is made for the benefit of the land, and in reliance on it as liable therefor; and should be regarded as conferring a lien in favor of the mortgagee, and as adding to the mortgage debt.

APPEAL by the defendant, from a judgment entered at a special term. The action was brought against Joseph Blunt, John Holmes Agnew, and Emeline his wife, to foreclose a mortgage for the principal sum of $2400; $1500 of which had been paid. The mortgage was made by the defendant Blunt to Jonathan Miller, and by him assigned to the plaintiff; the plaintiff claimed also to recover the amount of certain taxes and assessments, paid on the foreclosure of a prior mortgage. After the commencement of the suit, Howard C. Cady was made a party defendant, by order of court, upon his petition, and he put in an answer, in which he alleged, among other things, that on the 28th of August, 1847, (after the commencement of this suit,) he tendered to the plaintiff's solicitor, at his office, and to B. T. Sealey, clerk and general business agent of the plaintiff, the sum of $1047.67 to pay the amount due in this suit, and the further sum of $10 for contingencies, which amount the plaintiff's solicitor and the said Sealey refused to accept, because they had been instructed by the plaintiff, who was then absent from the state, not to receive the same, for the reason that it did not include a sum alleged by the plaintiff to have been paid by him for taxes. And the defendant claimed that, upon the making of the said tender by him, the mortgage ceased to be a lien upon the premises embraced therein. The complaint was taken as confessed, as to the defendants Blunt, and Agnew and wife. The cause was heard at special term, upon pleadings and proofs

as to the defendant Cady. And a judgment was entered declaring that the mortgage was a valid and subsisting lien on the premises, and that said lien was not divested, or discharged or impaired by the tender set up in Cady's answer; and directing the premises to be sold to satisfy the same, and the costs of this suit.

J. M. Van Cott, for the appellant.

J. Blunt, for the plaintiff.

By the Court, MITCHELL, J. Blunt, owner of the lands in question, mortgaged them to Miller, who assigned the mortgage to the plaintiff. Blunt then conveyed to Agnew, expressly subject to the mortgage, and the latter in June, 1847, conveyed to Cady; but Cady does not set up in his answer that he paid any thing on the conveyance, or that he did not know of the mortgage, or was not to take subject to it. The deed to him purports to be for $3500, and contains full covenants, without any exceptions. This action was commenced in July, 1847, against all the defendants but Cady, under the old chancery system. The bill was amended by making Cady a party, in February, 1843, and he answered in that month. In his answer he alleges that he tendered to the plaintiff's attorney on the 28th May, 1847, the principal, interest and costs then due on the mortgage; but does not allege a readiness still to pay the same, or that it is paid into court; or offer to bring it into court; nor is that readiness found by the special term. This allegation is an essential part of a plea of tender. (*See* 3 *Chitty's Pl.* 923, *note k.* 1 *Saund.* 33, *n.* 2. 8 *East*, 168. 1 *Ld. Ray.* 254.) It is also essential to a *perfect* tender, that the party should not only once offer the money, but that he should be always *ready* to pay it; so that a *prior* or *subsequent* demand and a refusal to pay is a good replication to the plea of tender, and makes the tender a nullity. (3 *Chitty* 1155, 6.) Williams, in note 2 to 1 *Saund.* 33, says, "When the defendant has been at any time requested to pay, either *before* or after

the tender, and neglected or refused so to do, that *avoids* all tenders made *both* before and after such request." See also *Hume* v. *Tiploe*, (8 *East*, 168,) where Lord Ellenborough asked the defendant's counsel if he could show any case where an averment *tout temps prist* was holden not to be necessary in a plea of tender, and added, "it was expressly decided to be necessary in *Giles* v. *Hartis*, (1 *Ld. Raym.* 254,) and it *was one of those landmarks in pleading that ought not to be departed from.*" The case of *Sheriden* v. *Smith*, (2 *Hill*, 538,) does not sustain the position that a replication waives this defect, but only that it waives what is a mere *irregularity in practice*, the omission actually to bring the money into court, and to produce the certificate of its being paid in.

This imperfection, both in the actual tender and in the plea of it, makes the imperfect tender a nullity, and does not protect the defendant even from the payment of subsequent costs and interest.

It is said that the tender causes the lien of the mortgage to cease. That effect can arise only when the tender is complete, that is, when there is not only one offer to pay, but a continuing readiness to pay. In *Jackson* v *Crafts*, (18 *John.* 110,) the person making the tender proved that immediately after the tender he deposited the money with a third person, who continued to hold it ready to pay it over. In that case, and in *Edwards* v. *The Farmers' Fire Insurance and Loan Co.* (21 *Wend.* 467,) the actions were ejectment, in which there were no special pleadings, but the plaintiff merely alleged his lawful possession of the premises in general terms, without setting out his title, and the defendant merely denied the unlawfulness of his own possession. In the latter case the question was not raised of the sufficiency of the tender, but only of its effect, conceding it to be good.

But in this the answer shows that the defendant claims that his tender exempts him from paying, and thus excludes the idea of *an offer* to pay or readiness to pay, and there is no proof of either.

The tender in this case was made long after the day on which

the mortgage became payable, and after the action was commenced against the mortgagor, and all parties but the defendant Cady, and when there was a controversy as to what was the precise amount due. It has been argued that this discharges the *lien* of the mortgage. If the question is to be decided without regard to authority, there could be little doubt that justice and policy would be against the proposition. When payment is delayed beyond the day prescribed by the condition, any uncertainty that follows is the result of this neglect of the debtor; payments may have been made of interest and of principal irregularly—receipts would be in the possession of the debtor, but the creditor might not have full memoranda of them—as in this case, the creditor might actually have paid taxes on the land, and reasonably believe that he might charge the amount against the mortgage, and yet that not be allowed to him on the trial. It would be very unjust in such a case, and destroy his lien and leave him only to a remedy against his *original debtor*, who would claim that when he sold subject to his mortgage, the lands became the principal debtor, and that as they were discharged by the fault of the creditor, he also should be discharged.

Decided cases are authority, first, in cases strictly similar, and secondly, as evidence of a pre-existing principle, on which they were founded. The decision may be right and the reasons assigned for it, or some of them, be wrong. Thus in the first case, in which it was said that a tender after the law day discharged the lien of the mortgage, (*Jackson* v. *Crafts*,) it is conceded that the authorities relied on by the learned judge applied only to a tender on the law day. (*See* 26 *Wend.* 557.) Laying aside, then, the *dicta* of the judges in the cases in this state, and it is decided as follows: In *Jackson* v. *Crafts*, that after a tender made of the whole amount due on a mortgage, after the law day, but while an advertisement *is pending*, *the object* of which is to *compel payment* of the mortgage, and when the tender is kept good by the money being kept ready for the mortgagee, and it is refused, in order to defraud the mortgagor of his title, there the mortgagor may defend his

possession against an action of ejectment brought by the mortgagee, or the purchaser, under the advertisement. It does not decide that he will not still hold subject to the mortgage, nor that the mortgagee might not foreclose if the tender was not kept good, and pleaded in the foreclosure suit with a *tout temps prist*. In *Edwards* v. *Farmers' Fire Ins. and Loan Co.* there was no question raised as to the perfect and continued goodness of the tender. *If* the case turned on the question of tender, it was decided that a tender made after the law day contained in the bond, but which was *extended* by the charter of the company to such indefinite period as the lands should remain unsold in the ownership of the company, entitled the mortgagor to recover the lands in an action of ejectment against the company claiming to own the lands *in fee*, but not in possession, as they were vacant lands. No disputed principle of law would be involved in such result.

Next, to proceed beyond the point *necessarily* involved in the cases. In the last case Justice Cowen insists that a tender after the law day is as effectual as on the law day, and quotes Lord Coke, speaking of a condition, that if it be refused the debtor may enter and the *land* is freed from the condition. (21 *Wend.* 488.) And it may have been his opinion that a single tender after the law day, or a refusal to accept it, although followed by an immediate offer afterwards to take the money and a refusal then to pay it, or by an utter inability to pay it afterwards, discharged the lien, so that there could be no foreclosure in equity; but he never expressed that precise opinion. He follows up the quotation from Lord Coke and the reference to *Jackson* v. *Crafts*, by a remark which seems to limit their effect. He says, "such a tender and refusal were then received *as so far equivalent* to payment that they raised the lien and *barred an ejectment*." Did he mean more than that they raised the lien so far as to bar an ejectment? That was all that the case cited, or the quotation from Lord Coke, necessarily decided. Lord Coke was speaking only of the *legal* right to an entry on the land, not to the lien inferable in equity, and that was all that was involved in *Jackson* v. *Crafts*. *Ed-*

wards v. *The Farmers' Fire Ins. and Loan Co.* was affirmed in the court for the correction of errors, by a vote of 11 to 8; the chancellor and 7 others voting for a reversal, on the grounds stated by him in *Merritt* v. *Lambert*, (7 *Paige*, 344;) Senator Verplanck delivering the only opinion for affirmance, which corresponded with that of Justice Cowen. In the supreme court Ch. J. Nelson "concurred in the conclusion" of Justice Cowen, but is not said to have assented to the reasoning. Justice Bronson dissented. The same question had been before the vice chancellor of the 1st circuit, in *Merritt* v. *Lambert*, on a bill to compel the performance of a contract to buy those lands after the tender by Edwards, and he concurred with the chancellor. The assistant vice chancellor dismissed the bill, not on the ground that the tender was good, but that a contract by the company to sell the lands was not a sale of them, within the meaning of their charter, and therefore Merritt, who had made such a contract before the tender, could not give a good title. (*See* 26 *Wend.* 551, *note.*)

The senators who voted to affirm, without assigning their reasons, may have done so for the same reason as the assistant vice chancellor dismissed the bill. That reason would probably be now approved by all. The parties cared comparatively little about the tender, as Mr. George Wood, the counsel for the company, said, "the *only important* question was whether, after the contract with the Merritts, the property in question could be considered as still remaining in the hands of the defendants unsold." That is, the question was not whether the company could enforce its lien as mortgagee, but whether it could claim the lands as owners in fee. Such, also, was the question in *Jackson* v. *Crafts.*

Afterwards came the case of *Arnot* v. *Post*, (6 *Hill*, 65.) There the lands had been sold on the foreclosure of a mortgage by advertisement, and the defendant Post was in possession on such sale. Arnot, after the sale, tendered the principal and interest on the mortgage and the costs of foreclosure, which being refused, he brought ejectment to recover the lands, he having purchased at a sheriff's sale on a judgment inter-

mediate between the mortgage and the foreclosure sale. The supreme court held the tender good, though made after the law day and after the foreclosure, and that as the statute declared that the rights of such judgment creditors "should not be prejudiced by any such sale," (2 *R. S.* 546, § 8,) they could bring ejectment after a tender. The court of appeals reversed their judgment (2 *Denio*, 344) by a vote of 11 to 9. Senators Bockee and Clark expressly holding that a tender after the law day did not discharge the lien of the mortgage; senators Johnson and Sedgwick also agreeing in that view, and holding besides, that the remedy of the judgment creditor was only in equity, to redeem. Senator Hard also was for reversal on both grounds, holding the doctrine of the supreme court as to tender at least questionable, and placing the decision of *Edwards* v. *Farmers' Fire Ins. and Loan Co.* on the charter of that company. Senator Porter, voting for a reversal, said nothing about the tender, but in an elaborate and able argument sustained the position that the only relief was to the judgment creditors and was in equity only. The other senators voting for affirmance, did so without stating their reasons. They may have done it on both grounds; and it is believed that the reversal has been generally understood as sanctioning the position that the lien of a mortgage was not so far discharged by a tender and refusal after the law day as to bar a bill for foreclosure of the mortgage. No case has yet decided that such was the effect of a tender, and there is no reason for establishing such a rule now.

There is another point which was not argued, but on which also the judgment should be affirmed. The plaintiff, while holding the mortgage, paid the taxes due on this lot, about the month of May, 1847. The taxes were a lien on the land, and when paid by the mortgagee cannot be deemed to have been paid in reliance merely on the personal liability of the owner of the lands, but in his character of mortgagee, and with a view to transfer the lien from the state to the mortgagee; in other words, the payment is made for the benefit of the land, and in reliance on it as liable therefor, and should be regarded as con-

ferring a lien in favor of the mortgagee, and as adding to the mortgage debt. Both the state and the mortgagor are interested in having such a construction of the law; the state in having taxes promptly paid, without which the wheels of government must be stopped; the mortgagor in saving the extra interest claimed by the state where there is delay in paying taxes.

The judgment should be affirmed with costs.

[New York General Term, February 12, 1857. *Mitchell*, *Davies* and *Roosevelt*, Justices.]

23 498
41 432
4L 251
4L 257
7L 84
34h 171
25a 266

Wright *vs.* Delafield and Curtis, trustees, &c., Berrien and others.

Where a deed fails to convey a fee, for want of words of inheritance, a court of equity will reform it in that respect. And the parties may do the same thing, in effect, by their own voluntary act.

On the 28th of November, 1835, several proprietors of land, in pursuance of an agreement previously entered into, and for the purpose of vesting the whole title to the lands in trustees, so that the latter could sell, and give a good title to purchasers, without the intervention of the proprietors, by deed referring to the agreement, conveyed the land to three trustees and their successors, to hold to the use and benefit of the proprietors, but no words of inheritance, and no express words showing the duration of the trust or of the estate granted, were used. On the 28th of November, 1838, a majority of the proprietors, pursuant to a clause in the original articles of agreement, signed an agreement modifying those articles and appointing C. & G. trustees in place of the three original trustees, and directing the latter to convey to C. & G. *the legal estate* in the lands. Accordingly, on the 29th of November, 1838, the original trustees conveyed the land to C. & G. with *words of inheritance*. On the 27th of November, 1843, D. & C. were appointed trustees, the former in the place of G., and the proprietors directed G. to convey the *legal estate* to D. & C. as trustees, and G. accordingly conveyed to D. & C. with words of inheritance. In 1844 and 1848 the proprietors expressly declared that D. & C. were thereby "*continued* in office as trustees."

Held that this was a recognition of D. & C. as lawfully existing trustees, with such estate as was granted to them, and a reappointment of them with the like estate. That it was a confirmation of the conveyance to the new trustees, and bound the proprietors; especially as it was in conformity with the actual

intention of the original articles And that D. & C. as such trustees, could give a legal and equitable title to a purchaser, unless it was affirmatively shown that there was some defect in the original title of the proprietors, or that the land was incumbered, or the trust deed was void.

Held also, that the original trust deed of November 28th, 1835, was valid as a power in trust, under the revised statutes; and that the present trustees could give a good title, by virtue of the power in trust granted to them.

Held, further, that where a party purchased a portion of the trust property of the trustess, in 1841, he at that time being also an owner of 11 out of 2400 shares of which the whole property consisted; and had remained in possession, under the trustees, and received the rents, and paid three installments upon his purchase, not showing any other proprietor, under whom he held, he could not refuse to pay the consideration agreed on for his purchase, without offering to rescind the contract and deliver up the property.

Also held, that the purchaser could not keep the land and refuse to pay for it; whether the title was good or bad. That if it was bad, he must elect to take it as it was, or as the proprietors could make it, and pay for it; or else to give it up and account for the rents and profits. And that, as he did not elect to do the last, he must pay for the land.

In the absence of proof to the contrary, it is to be presumed that the laws of another state are the same as ours, in respect to contracts relating to personal estate, and as to commercial matters particularly; and that when the common law is known to prevail, it is construed there as it is with us, whether relating to lands or personal property.

But no such presumption can be entertained in respect to the statute law of this state.

Under a power given to the directors of an association "to appoint a secretary and such surveyors and other assistants as may be necessary," they can appoint an agent, who may sign contracts, on such terms as shall be previously authorized by them.

Generally, the question whether a good title can be made is to be passed upon before a referee, and so also is an account to be taken before him. But the parties may, if they choose, and the court consent, have those matters inquired into by the court.

Where a purchaser seeks a specific performance, he is bound to pay notes given by him for the purchase money, and interest, together with the costs of suits brought against him upon those notes, and the costs of the suit for a specific performance, before he will be entitled to a deed.

APPEAL by the plaintiff, from a judgment entered at a special term. In the year 1835, the executors, &c., of Robert Mitchell, deceased, the trustees of creditors of the firm of Carnochan & Mitchell, and six other persons in their own right, being the proprietors in various proportions of a tract of land,

in Florida, between the St. Mark's and Apalachicola rivers, containing about one million two hundred thousand acres of land, known as the Forbes' Purchase, entered into an agreement dated on the 25th of November of that year, reciting that, to enable the proprietors *to give clear and unimpeachable titles to purchasers without delay*, it was proposed to vest the whole title in three trustees, so that they might *immediately* make legal title to all purchasers, and divide the proceeds among the parties. The agreement also provided, that such tract should constitute a common fund, for the use of the parties thereto according to their interests, and that to render such fund available in the most expeditious manner, they associated themselves together thereby as a company, under the name of the Apalachicola Land Company; that the land should be conveyed to Messrs. McLane, Davis and White as such trustees, in trust for the parties thereto in various proportions, and to convey the same as therein prescribed; which trustees should divide the said land, so constituted a common stock, into 2400 shares of 5000 acres each, for which they should issue certificates to the proprietors according to their respective interests, transferable only on the books of such company. They were also to convey the lands to such persons as purchasers, as should be selected by six or such other number of persons as they should designate, to be chosen by the proprietors at such times as the trustees should appoint, to whom the names of directors was given; the first trustees (being the six largest proprietors) to have the purchase money placed in their hands, to be distributed among the proprietors; their *term of office* was to be for three years. at which time their trust was to close, unless renewed by a vote of such directors; the agreement also provided that two-thirds in number of the certificate holders might arrest the proceedings of the directors, remove them, elect new ones, and make further regulations and restrictions for the sale of the lands, and the distribution of the proceeds; and that two-thirds in interest of such certificate holders concurring after a period of three years, might alter or modify the provisions of that agreement in such manner as they might think most conducive to the interest of the concern.

Provision was also made in such agreement to pay off a mortgage upon the land conveyed, by a sale of some of the certificates of ownership, so to be issued, and to have the certificates belonging to the trustees of the creditors of Carnochan & Mitchell held by the trustees of the company, until a definite arrangement could be made with such creditors, or delivered to such creditors, and the remaining stock handed over to the trustees of such creditors. The proprietors of the land, on the same day the agreement was executed, by a cotemporaneous deed of bargain and sale, conveyed their interest and shares in such lands to Messrs. McLane, Davis and White, and their successors, without any words of perpetuity, to have and to hold the same to the use of the stockholders of the company, known as the Apalachicola Land Company, and for the trusts and purposes set out in such agreement, and no other. Between the years 1835 and 1838, William Wright, the father of the plaintiff, who, as survivor of a previous firm, was a creditor of the firm of Carnochan & Mitchell, made a compromise with their assignee, by means of an agent, and received twenty-four shares of the stock of such association, and subsequently gave the plaintiff, some time between the years 1840 and 1842, twelve shares of such stock; this stock was placed on the books of the association in the name of Wright & Co., which partnership consisted, in the years 1839, 1840 and 1841, of the plaintiff and the agent who made the compromise. In the fall of the year 1840 or the succeeding winter, the plaintiff entered into possession of part of the lands so conveyed to said trustees, consisting of a wharf lot and another in the neighborhood, in the city of Apalachicola, and built a wharf on the first, and erected a cotton press on the second, at an expense of from twenty to thirty thousand dollars. While thus in occupation with his partner, Henry D. Dardin, in October, 1841, he entered into two contracts with the defendant Joseph Delafield, claiming to be the agent of the Apalachicola Land Company for that purpose, for the purchase of said lots, so severally occupied by him. By the first of said agreements, purporting to be made between the Apalachicola Land Company by said Delafield, as their agent

and the said plaintiff and Dardin, the latter became the purchasers of the wharf lot, or privilege in front of Palmetto street, for four thousand dollars, from the said company, who thereby agreed to make, or cause to be made to the purchasers, a *good and sufficient title* for the premises, upon the payment of the purchase money, in five yearly installments, beginning with the first of May then next, for which they took the notes of the plaintiff and Dardin, payable to the defendant Delafield and Mr. George Griswold. It was also agreed, that the company might sell such premises at the risk of the purchasers, to meet any of such notes not paid when due, and that, if at any time within twelve months, the purchasers should pay one half of the purchase money, they should be entitled to receive a deed, on executing a bond and mortgage for the remaining one half. The contract for the other lot was to the same effect, except as to the lots which were upland, and the price, which was three thousand dollars. In 1838, the owners of certificates of interest in said land under said agreement, amounting to more than two-thirds of all the shares, executed an agreement, dated the 28th of November in that year, by which they constituted the defendant Curtis and Mr. Griswold, trustees of said lands, in place of said McLane, Davis and White; directed the latter to convey the same to the former; required the former to execute an obligation, binding the company to carry out contracts made by the latter; limited their term of office to five years; but agreed that two-thirds of the stockholders in interest might, after a year, appoint new trustees, and alter or modify either the original agreement or that one. The directors were reduced also to two, besides the trustees. Simultaneously therewith, Messrs. McLane, Davis and White executed a deed of bargain and sale to Messrs. Griswold and Curtis, as joint tenants, in fee simple, of such part of the land conveyed to the former as remained unsold, for the use of the stockholders of the Apalachicola Land Company, and for the uses specified in the original agreement and in the instrument last above mentioned, both of which are recited in said deed. In 1843, the owners of certificates of interest in said lands, under the said original agree-

ment, amounting to more than two-thirds of all the shares, executed an agreement, bearing date the 27th of November of that year, whereby they constituted the defendant Delafield trustee, in place of the said Griswold; directed the latter to convey the legal estate in the lands left unsold, to the defendants Delafield and Curtis; limited the term of office of the latter to one year; enlarged the number of directors to seven, in addition to the trustees, and directed such trustees to convey to such persons as the directors might appoint. Simultaneously with the execution of such agreement, the said Griswold executed a conveyance in fee simple of all his estate in said lands to the defendants Delafield and Curtis, as joint tenants, for the use of the stockholders of the Apalachicola Land Company, and the uses of the original agreement respecting the same, and the other agreements hereinbefore referred to. In the years 1844, 1845 and 1848, three several agreements were entered into, signed by the proprietors of two-thirds of the certificates of interest in said land, described in the original agreement, professing to act by authority given by such instrument, by which Delafield and Curtis were continued in office successively, as it is therein termed; first, one year, from the 28th November, 1844; secondly, for the term of three years from the 28th of November, 1845, and finally, for three years from the 28th of November, 1851. On the eleventh day of December, 1838, the defendants Curtis and Delafield, the former trustee Griswold, Mr. Carnochan, one of the parties to the original agreement, and Mr. J. A. Johnson, named as directors in the agreement of November, 1838, passed a resolution appointing the defendant Delafield, their *general agent*, with a salary, but not otherwise defining his powers or authority. In the years 1836 and 1837, the proprietors of the said lands sold at public auction, in the city of Apalachicola, several lots out of them, including some on Palmetto street, at which sales three of the original proprietors and directors were present, and where such lots were sold according to maps, on which streets, plots, squares and wharf property were laid down, and the streets laid out down to the water, and the foot of the streets blocked off as wharf lots, including that

sold to the plaintiff, which faces Palmetto street. The city of Apalachicola brought suit for the wharf lots, except the plaintiff's. upon the ground of dedication by such maps, and recovered. One of the notes given for the purchase of the wharf lot, due on the first of May, 1844, for eight hundred dollars, was delivered by the defendant Delafield to J. Macpherson Berrien, Esq., in consideration of a debt due to him by the associates of said company, for professional services rendered by him, he having been counsel for the said company, which the plaintiff claims he took with legal notice of its original consideration. This note was placed in the hands of the defendant Selden, for the purpose of collection. The complaint alleged that large sums of money were received by the original trustees from the sales of said lands, which had come to the hands of the defendants Delafield and Curtis, and that nothing had been paid, as dividend, to the plaintiff or any other proprietor of certificates of interest in said land.

The plaintiff alleged that the associates of said company could not, as he was advised by counsel, convey a good and sufficient title to the lands, by reason of mortgages and other liens, or estates outstanding on said lands; that Delafield and Curtis could not convey to the plaintiff, and that the plaintiff and other associates owned the lands; that Delafield and Curtis had no authority to bind said associates or trustees by such contract, except under and by virtue of the terms of said articles of association, and that Delafield and Curtis were mere agents, to distribute the proceeds among the associates of the said Apalachicola Land Company, who are the real owners and parties in interest. That he was a partner with the other associates of said company, and that the associates of said company being indebted to Mr. Berrien, for counsel fees, transferred one of the notes to him, and he *took said note in payment for an antecedent debt incurred to him by said company, or their agents or trustees*, and he, therefore, prayed, that said Berrien be restrained from commencing any suit upon said note. The plaintiff alleged that he had paid two notes, each for $800, and one note for $750, together making $2350; and that he had had

the exclusive use and possession of the lands purchased for fourteen years, from October 11th, 1841; and was still in possession. He further prayed for a conveyance of the lands to him by a good and sufficient title, and that the defendants be decreed to pay back to him the amount of the notes collected, and be restrained from collecting any more. He also prayed that Delafield and Curtis might account for the proceeds of the sales of the lands sold and pay to the plaintiff his share thereof.

The answer of the company, by its trustees Delafield and Curtis, averred the perfect ability of the company to perform, insisted that by the terms of the contract, the plaintiff was bound first to pay the consideration money for which he had given his notes; his default in paying those notes; actions at law pending upon them, and the readiness of the company to give deeds on payment of said notes with costs, according to contract.

Berrien answered separately. He alleged, in his answer, among other things, that the promissory notes owned by him *were part of sundry notes received by him from the Apalachicola Land Company, in satisfaction of a claim he had against said company, which was released and discharged by him* (*Berrien*) *in consideration of the transfer to him of the said notes by the company.*

A reply was put in, and proofs were taken. The judge, at special term, decreed a specific performance of the contract, upon payment of the consideration money remaining unpaid, by the plaintiff; that the plaintiff pay the promissory notes given for the consideration money, which still remained unpaid, with interest and costs of suits thereon; that Delafield and Curtis, trustees, should make and execute a good and sufficient deed of conveyance of the premises mentioned in the contracts and in the pleadings, to be approved by one of the justices of this court, and to be delivered to the plaintiff on payment of the amount due upon the notes, with the costs of the suits brought on said notes; also that the plaintiff pay to the defendants their costs of this suit.

A. L. Robertson, for the appellant.

John Anthon, for Delafield and Curtis.

P. Y. Cutler, for the defendant Berrien.

John Townsend, Jun., for the defendant Selden.

By the Court, MITCHELL, J. Previous to November, 1835, Peter, John, Thomas and Collin Mitchell, Richard Carnochan, Thomas Vermilyea, B. W. Rogers, John Graham and Benjamin Marshall were interested in lands in Florida, known as Forbes & Co.'s purchase, and amounting to about 1,200,000 acres. Their title had been in dispute, but was confirmed by a decision of the supreme court of the United States. On the 28th of November, 1835, they agreed that each proprietor should vest, by regular deeds, the whole title to the lands, legal and equitable, in three trustees, and that the affairs of the company should be conducted by six directors, whose powers and duties were regulated by the articles of association. The land thus conveyed was to be represented by scrip to be issued by the trustees to each proprietor in proportion to his interest in the land; each share to consist of 500 acres, and the whole number of shares to be 2400; saving shares enough to satisfy a mortgage upon the land "so that the entire title" (to the land) "unincumbered, *in law and equity*, shall be fully, absolutely and unconditionally vested in the said *trustees*, that they may immediately make legal titles to all *purchasers*, and divide the *proceeds* among the stockholders." The land was to be conveyed to Louis McLane, Charles Augustus Davis and Joseph M. White, to hold to them, their successors and the survivor of them in trust for the benefit of the proprietors, and in trust to convey the same in the manner prescribed in the articles. Contracts for the sale of the lands were to be made by the board of directors, and notes and bonds to be taken by them, payable to the trustees; and deeds of conveyance were to be executed by the trustees, or any two of them. The trustees were to hold their

offices for three years, at the expiration of which time the trust was to close, unless renewed by a vote of the *directors*. After the three years, the stockholders or *two-thirds of them in interest* concurring, might alter or modify the provisions of that agreement in such manner as they might think most conducive to the interest of the concern; provided that no alteration should be made to change any contract for the hypothecation or pledge of scrip for the payment of any loan to extinguish mortgages or other liabilities authorized by these articles. In pursuance of this agreement, the proprietors, on the same 28th day of November, 1835, by deed of that date referring to the above agreement, and for the *purpose of making the land available in the most expeditious manner*, and reciting that it was to be conveyed to the trustees above named on certain trusts specified in the articles, conveyed to the trustees "parties of the second part, and to their successors, all their right and title in law and equity" to said lands, "to hold to the use and benefit of the stockholders" and to the several uses, interests and purposes in the said memorandum of agreement set forth. No words of inheritance, and no express words showing the duration of the trust or of the estate granted, were expressly used. On the 28th of November, 1838, an agreement was signed by the owners of 2233 out of 2400 shares, pursuant to the clause contained in the original articles, modifying those articles in several respects, and among others, appointing Lewis Curtis and George Griswold trustees in place of the three trustees, and directing these last to convey to the two new trustees the *legal estate* in the lands, and declaring that the new trustees should hold their offices for the term of five years from the date of this last instrument, unless among other things, those articles should be altered and new trustees appointed; and also providing that at any time after the first year "the stockholders, or two-thirds of them in interest concurring," might appoint new trustees, and alter or modify the provisions of the articles and of this last agreement, in such manner as they might think most conducive to the interest of the concern, but with the proviso contained in the first articles. The number of directors was reduced to

five, and it was made their duty to make sales of the lands in such manner, and to such persons, and for such prices, and to take such security, as the majority of the directors should think proper. They also had power to appoint a secretary, and such surveyors and other assistants as might be necessary, and in general to do all things necessary and proper to carry the objects of the trust into effect. The trustees were to make conveyances to such persons as the directors should order and direct. On the 29th of November, 1838, by deed reciting, in substance, the articles of agreement, the deed of 28th November, 1835, the instrument of 28th November, 1838, and its direction to the original trustees to convey, the said trustees conveyed to Lewis Curtis and George Griswold, their *heirs and assigns*, all and singular the said tract of land, and all the estate, &c. of the said three trustees, to hold to the new grantees, their heirs and assigns, as joint tenants and not as tenants in common, in trust for the use and benefit of the stockholders and for the purposes in the original instrument, and in the instrument altering it, set forth.

Subsequently, on the 27th of Nov. 1843, the articles were again amended, by the concurrence of at least two-thirds in value of the share owners. The secretary of the company, the case says, testified that the several amendments were signed by two-thirds of the stockholders in *value;* he did not know if they were two-thirds in *amount.* If they were two-thirds in value they must have been two-thirds in interest, and the secretary must have meant, by two-thirds in amount, two-thirds of the number of the stockholders. They were again amended June 26, 1845. The conveyance to Curtis and Griswold must have been known to the shareholders, and also the subsequent one to Curtis and Delafield. These amendments recognize and ratify these conveyances. The amendments of 27th Nov. 1843 refer to the original articles and their amendments, and renew and continue in force the said articles of association for one year from the 28th of Nov. 1843, and appoint Delafield and Curtis trustees; the former in the place of Griswold, "who is directed to convey to Delafield and Curtis the legal estate, so

far as the same is vested in him." On the execution of which conveyance, &c. Delafield and Curtis are directed to deliver to Griswold an obligation binding the company to execute all contracts made under, and duties imposed by, the articles of association and by-laws, upon said Griswold as trustee. The new trustees were to continue for one year. The duty of the directors to make sales, and of the trustees to execute deeds, is repeated, but no deed is to be ordered "until the purchase money be paid," or the "residue unpaid be secured by a bond or note, with a mortgage on the premises." The amendments of Oct. 7, 1844, continue the articles as amended, for one year from Nov. 28, 1844, and declare that "*Delafield and Curtis are hereby continued in office as trustees for the term of one year* from the 28th day of Nov. 1844." The amendments of 26th June, 1845, continued the articles for three years from 28th Nov. 1845, and declare that "Joseph Delafield and Lewis Curtis are hereby continued in office as trustees for the term of three years from the 28th day of Nov." 1845. The articles were again amended on the 4th of Nov. 1848, and Delafield and Curtis were reappointed and *continued* trustees for the term of three years from 28th Nov. 1848.

The object of the association was to transfer the legal title to trustees, so that they could sell and give a good title to purchasers, without the intervention of the proprietors, and notwithstanding any change in the ownership of the shares. To effect this, it was necessary that the fee should pass to the trustees. If the original deed failed to give them the fee, for want of words of inheritance, a court of equity would have reformed it in that respect. The parties, in effect, did the same thing. The original trustees having conveyed to the second set of trustees with words of inheritance, two-thirds in interest of the shareholders, under the power in the original articles to alter and modify those articles, directed Griswold to convey the *legal estate* to Curtis, as trustee in his place, and Griswold accordingly conveyed to Curtis, with words of inheritance. The like two-thirds in interest of the shareholders, who must be assumed to have known the nature of the con-

veyance to Delafield and Curtis, and that it was in fee, in 1844 and 1848 expressly declared that "those gentlemen were thereby *continued* in office as trustees." This was a recognition of them as lawfully existing trustees, with such estate as was granted to them, and a reappointment of them with the like estate. It was a confirmation of the conveyance to the new trustees, and bound the two-thirds in interest who concurred in it, and by virtue of the powers vested in such two-thirds by the original articles, bound also the other shareholders; especially as it was in conformity with the actual intention of the original articles.

The trustees, therefore, can give a good, legal and equitable title to a purchaser, unless it be affirmatively shown that there was some defect in the original title of the proprietors; or that any parcel of land is incumbered; or that the trust deed is void.

The cause was tried at special term, and the facts tending to show the objections to the title there proved. The only evidence of a defect in the title of the trustees related to a portion only of the lands; and showed that the city of Apalachicola brought ejectment, in the spring of 1848, against Day & Co., in place of whom Curtis and Griswold, as such trustees, as before mentioned, were admitted to defend, as the landlords; that the premises then in controversy were lands lying at *the foot* of Florida promenade, bounded on the sides by wharf lots Nos. 6 and 7; at the foot of Leslie street, bounded on the sides by wharf lots Nos. 12 and 13; and at the foot of Center, Chestnut, Palmetto, Cypress, Juniper, Fulton, Monroe, Franklin and Jefferson streets; each lot bounded on the sides by wharf lots of certain numbers; the land at the foot of Palmetto street being bounded on the sides by wharf lots Nos. 28 and 29; and that the city, on a trial upon the merits, recovered those lands, and was put into possession of all except the lands held by the plaintiff. Part of the evidence in the case is given in the record of that trial. Among the evidence was the above deed to the original trustees, and the deed from them to Curtis and Griswold, and a deed from the two last trustees to Nourse and

Brooks, conveying a lot in Apalachicola by a map on file in the city council, bounding it by Water street, Chestnut street, and other lots on said map; Chestnut street running down to the river. The court must have held that Curtis and Griswold were the landlords by the law of Florida, when it admitted them to defend as such; and thus included a decision that the trusts under which they held were legal by the laws of Florida, and that they had the legal estate, and not a mere power. No evidence of title on the part of the city seems to have been produced. It may therefore be inferred that the court held, 1st. That the trustees on behalf of the association making a map of that part of their lands, laying them out with streets, and selling by such map, thus dedicated the streets to the *public;* and 2dly. As the lots claimed in that suit were all at the *foot* of such street, and bounded *by wharf lots on their sides*, that the court also held (as is held in favor of this city) that the slips extending at the *foot* of streets, and in continuation of them, and the wharves erected over such slips, belonged to the city; unless, in the maps laying out the property, or in some other equally notorious way, such slips and wharves were reserved for the original owners. The lands which the company agreed to convey to the plaintiff and Dardin are described in the agreement as in *front* of Palmetto street, marked F. on the city map, and lying between wharf lots Nos. 28 and 29 of said map. The lands in the ejectment suit are described as at the *foot* of Palmetto street, and as bounded on the sides by wharf lots Nos. 28 and 29. The descriptions seem to be nearly the same; especially if Palmetto street runs *to* the river, and not along or parallel with it. Yet it was stated, in substance, on the argument, and not denied, that these are different lots. If they are the same, does that decision control as to the lots in question? It would if that action properly brought the title to *these* lots in issue. But the action was ejectment in its old form, in which Richard Roe, lessee of the city of Apalachicola, was plaintiff, and John Doe defendant, and the latter gave the ancient friendly notice to J. Day & Co. *tenants in possession*, to come in and defend. The *possession by those tenants*, ac-

cording to that form of action, limited the extent of the recovery and although lands not occupied by such tenants might be described in the declaration in ejectment, yet as the tenants of these latter lands would have no notice of the action, the judgment could not affect the title to them. Accordingly, the plaintiff's evidence shows that while possession was given to Nourse and Brooks as agents of the city, by the marshal, of the other lands described in the ejectment suit, it was not given of the lands held by the plaintiff and Dardin, but that they retained and still retain the possession, notwithstanding that recovery. The plaintiff does not, in his complaint, pretend that there has been any recovery against him by the city of Apalachicola, or by any one else, of the lands held by him under the company. The plaintiff's witness, Porter, states facts which may well account for a decision in his favor if he had been a party to that suit, and against Day & Co., and against the trustees as to certain other streets and lots at the foot of those streets. He says that in 1835, 1836, 1837 and 1838 the trustees made sales of lots in the city of Apalachicola, at auction, and sold by a map, on which streets, plots, squares and wharf property were laid down; that at the first sale, the streets were laid out *to the water*, but at the second sale the *foot of each street was blocked off as wharf lots*, and that the wharf lot of the plaintiff was one of the lots so blocked off. This blocking off of the plaintiff's wharf lot was an open and public notice that it was reserved by the trustees for their benefit, and that it was not to be dedicated to the public, and they saved it to the company.

The plaintiff, also, in his complaint, had specified the defects in the company's title, on which he relied—that the associates of the company could not convey a good title by reason of mortgages and other liens or estates *outstanding* in said lands. The term "*outstanding in* the lands," and the connection of it with the words "*mortgages and liens*," shows that the defects intended were *incumbrances* on the land, and not a total want of title. The plaintiff's objections should be confined to those unless he clearly made out an actual want of title, and in such a way as not to surprise the defendants.

The complaint also alleges that Delafield and Curtis cannot convey a good title. But this refers to the supposed invalidity of the conveyance to the trustees. There is no proof that the mortgage referred to in the articles of association covered the property now in suit; and it is not to be inferred without proof.

The next question is as to the validity of the trust deed. As already stated, there is some proof that the deed was held to be valid by the laws of Florida, in the ejectment suit. The broad proposition has been pressed on the court that the law of our own state is to be deemed the law of other states, unless proof to the contrary be shown; and that this is so, even as to our statutes, and even as to those relating to titles to lands and to trusts. If that were so, the proof in the ejectment suit would change the burthen. But the rule is too broadly stated. The true rule assumes to be founded on a probability that it will lead to the actual truth, and is not a technical rule forced upon courts against their conviction of what is right. Until the contrary is proved, it is more likely to be true than false, that the laws of another state are the same as ours, as to contracts relating to personal estate, and as to commercial matters particularly; and that when the common law is known to prevail it is construed there as it is with us, whether relating to lands or personal property. So also, interest is now considered as much an incident to a loan of money as rent is to the letting of a house or of lands. It is therefore an assumption most compatible with truth, that interest at *some rate* is allowed in every state. Although the *rate* of interest, therefore, is fixed by statute, yet as some rate is universal, our courts must allow some rate; and if the parties furnish no better guide to the truth, the court assumes ours to be the legal interest, in computing the amount to be recovered. But when we introduce what we know to be a new law, (as is our statute respecting trusts,) it would be a perversion of reason to pretend to infer that as soon as we placed the new law on our statute book, every other state in the union and in the world would adopt the same law. Slavery was abolished here in 1826. It would be a bold proposition that we should infer that it was thenceforth abolished in

all the other states in which it was proved to have previously existed. Within the present century we have adopted laws giving priority to conveyances of lands according to the order of time in which they are recorded; creating liens in favor of mechanics; at one time making banking a monopoly—afterwards opening it to all, under certain restrictions. Many of the states have by express statute, adopted similar laws. He would be a very unwise man who, inferring that our sister states had conformed their laws to ours, should make his investments accordingly. And it would be no less unwise and unjust in a court, to make the same inference, and on it to determine the rights of parties. Any conclusion which shocks reason and common sense cannot be founded on correct rules of evidence.

The cases quoted are generally consistent with the above principles. In *Dollfus* v. *Frosch*, (1 *Denio*, 374,) it was *said* that we must presume that the law of France allows three days of grace on bills of exchange. In *Leavenworth* v. *Brockway*, (2 *Hill's Rep.* 201,) the same principle was applied, and it was held that it was to be presumed that the law of Ohio, as to the steps necessary to fix an indorser of a note was the same as the law of this state. (*So also Brown* v. *Gracey*, 16 *Eng. Com. Law. Rep.* 426; 2 *Dowl. & Ry.* 41 *in note.*) See, however, the note to 2 *Hill*, 202, which shows that in Illinois (in *Mason* v. *Wash*, *Breese's Rep.* 16,) inasmuch as a statute of Illinois required things to be done to charge an indorser, more than the common law requires, the court there inferred that the laws of this state conformed to the Illinois statute; and that in South Carolina it was held, in *Allen* v. *Wilson*, (2 *Hill's So. Car. Rep.* 319, 322,) that the plaintiff could not recover money won at a faro table, as gambling was unlawful by the statutes of South Carolina. And see also *Harris* v. *Allnut*, (12 *Loui. Rep.* 465,) there referred to. The case in South Carolina is analogous to one that had been decided in England, and may be reconciled on the idea that gambling is immoral, and injurious to the community, and that therefore the courts of any state which condemns it, cannot sanction a recovery on such a consideration.

In *Hosford* v. *Nichols*, (1 *Paige*, 226,) the chancellor, holding that it could not be alleged that a mortgage given in Pennsylvania, on lands in New York, pursuant to a contract made in New York, would be void for charging seven per cent interest, said that it did not appear that the laws of Pennsylvania made void contracts for more than six per cent; and that courts of this state cannot take notice of the laws of other states, unless they are *proved* in the same manner as other facts; citing 8 *John.* 189; 2 *Cranch*, 186.

In *Thompson* v. *Ketcham*, (8 *John.* 189,) which was an action on a promissory note made by the defendant, an infant under 21 years of age, in the island of Jamaica, the court refused to take notice of what the law of that island was, as to infancy, and did not assume that it was the same as ours; the court saying that it lay with the defendant to show that his plea of infancy was good by the law of Jamaica, and that the court are not to know that fact without proof; that it is "the duty of the party who interposes a defense to a contract otherwise binding, to prove every thing requisite to the validity of the defense."

In *Robinson* v. *Dauchy*, (3 *Barb. S. C. Rep.* 29,) an action claiming to recover goods on account of fraudulent representations of the purchaser, the court said "*prima facie* the law of Massachusetts, where the fraud was committed, is like our own, and when no proof is given on the subject, our courts will act on their own laws." So far as relates to the effect of fraud, at common law, this was undoubtedly correct, as we know that the common law prevails in that state.

In *Abell* v. *Douglass*, (4 *Denio*, 305,) the plaintiff sued to recover moneys paid by him to the defendant. One objection to his recovery was that they were paid voluntarily, with a full knowledge of all the facts of the case. The defendant and others had joined in a purchase of lots at Erie, Pennsylvania, with a view to speculation. The title was taken in the name of McCluer, who held it for the benefit of, and under a trust (probably secret and not in writing) for, those who advanced the purchase money. The plaintiff, after this, bought (by verbal

agreement) the defendant's share in the purchase and gave his own notes for the amount, which he afterwards paid. He sued for the money thus paid. It was shown on the trial that the statute of frauds of Pennsylvania made void all sales by parol of any *legal* estate in lands. No statute of that state was proved making void the sale by parol of *equitable* interests in lands; and decisions of the courts of Pennsylvania were referred to by our court, (not proved on the trial,) that such sales were valid. If our statutes respecting lands and as to trusts are to be presumed to be the law of other states, then, as only a certain section of the Pennsylvania statute was proved, and it was not proved that their statute of frauds, and as to trusts, had not all the provisions of our statutes, it would have followed that as our statute prevents any trust resulting in favor of the person who has paid the consideration money for land when he has allowed the title to be taken in the name of another, the defendant had no legal or equitable title to the lands. (1 *R. S.* 728, § 51.) See also, our statute making void generally parol trusts as to lands. (2 *R. S.* 728, § 51.) And as our statute relative to trusts allowed only certain express trusts, among which was not included a trust to sell or hold for the benefit of the owners of the land, (1 *R. S.* 728, § 55,) the trust under which McCluer held, if it were express, would also be deemed void, until it was proved that there was no such statute in Pennsylvania; just as is contended by the plaintiff in this case. But the court took no such view of the law. They said "we are to assume that the *common law* was in force in Pennsylvania; and as far as appears by the evidence given on the trial, there is nothing in the statute law of that state to prevent a transfer by parol of the defendants' *equitable* interest in the land being as effective as a transfer in writing would have been." Thus they assumed the common law to exist in another state, until the contrary was proved, and did not transfer our statute law to a neighboring state, as part of its law. Taking the decisions of our own state as the guide, this is clearly the rule in our state.

But if our statute law were to prevail, the result would

not be different. The revised statutes have declared that words of inheritance shall not be requisite to convey an estate in fee, and that every grant of real estate shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant. (1 *R. S.* 748, § 1.) This would give to the first three trustees the fee in the lands. They also declare that when an express trust is created for a purpose not enumerated in the article on trusts, it shall be valid as a power in trust if it authorizes the performance of any act which may be lawfully performed under a power. (1 *R. S.* 729, § 58.) The article on powers describes a general power as one which authorizes an alienation in fee to any person whatever; (*Id.* 732, § 77;) and declares a general power to be in trust when any person other than the grantee of the power is designated as entitled to the proceeds or other benefits to result from the alienation of the lands. (*Id.* 734, § 94.) All the trust deeds refer to the articles of association, and show that the trustees were appointed to sell the lands, and that persons (other than the grantees of the power, who were the trustees,) were designated as entitled to the proceeds, namely, the *grantors* of the estate and power. The deed was therefore valid as a power in trust. Sections 102, 108 and 134 of the article on powers, together with other sections in the same article, and the adoption of sections 66 to 71 inclusive, of the article on trusts, show that a power in trust is not (like a mere power of attorney to convey lands) revoked by the death of the grantor of the power, or a sale of his interest; but that the power still continues until it is revoked pursuant to an authority contained in the instrument creating the power. The present trustees could, therefore, under our laws, give a good title by virtue of the power in trust granted to them.

There is another answer to the plaintiff's objection to the title of the trustees. He made his written contract to purchase from the company in Oct. 1841, and whether he took possession before or after that time, he has held under the company ever since, and shows no other title under which he pretends to hold. The

evidence shows that no one claims adversely to the company any part of the wharf lots, except that the city claims and has recovered as by dedication from the trustees, those wharf lots, which on the maps were laid out as open to the public. The plaintiff, with a knowledge of the sales made by the trustees under which this dedication was inferred, contracted to buy those lots of the company, in 1841; he at that time being also an owner of 11 out of 2400 shares of which the whole property consisted. He remained in possession under the trustees, as was shown by his paying the first three installments which by his contract he was to pay, viz: $800 in May, 1842, $800 in May, 1843, and $750 in October, 1843. He still continues in possession, and it must be under them, since he does not show any other proprietor under whom he holds. The rent he has received has been (at one time at least) $3000 per annum. Under these circumstances he cannot refuse to pay the consideration agreed on for his purchase, unless he offers to rescind the contract and deliver up the property. This he has never done, and shows no disposition to do now. He cannot keep the land and refuse to pay for it; whether the title be good or bad. If it is bad he must elect to take it as it is, or as the associates can make it, and pay for it, or else to give it up and account for the rents and profits. As he does not elect to do the last, he must pay for the land. The prayer of his complaint is not that the contract may be rescinded, but that the trustees *may account* for the proceeds of sales made by them, and may be decreed to convey the lands to him by a good and sufficient title, and to relieve it from incumbrances or outstanding claims, and repay to him the amount paid by him, &c.; and that the trustees be removed and new trustees be appointed, &c

The plaintiff objects that the agreement with him was signed not by the board of directors, but by Delafield whom they had appointed their agent, and that they had no power to appoint an agent with power to contract to sell. If this be so, and the plaintiff is not bound by the contract, then he can come into court only on the ground that neither he nor the company

is bound by the contract. In that case he is still bound to pay his notes, unless he offers and is willing to give up the lands and to account for the rents and profits. This he shows no inclination to do. His prayer is not to rescind the contract, but for a specific performance of it. He thus adopts it as a valid contract, and the company do the same, by recognizing the acts of Delafield, and insisting on the plaintiff's performance of it; by accepting the payment of some of the installments, and using and appropriating as their own the notes given by the plaintiff for the residue of the purchase money. Under the power in the directors "to appoint a secretary and such surveyors and other assistants as might be necessary" they could appoint an agent who should sign contracts, on such terms as should be previously authorized by them. It is to be presumed this was done in this case.

The plaintiff also claims that he is entitled to an account of the general proceeds of sales. This has been given in general terms, in the evidence at special term; it being shown that such accounts have been rendered periodically, and that the expenses and payments exceeded the amounts received. Generally, the question whether a good title can be made is to be passed upon before a referee, and so also is an account to be taken before him. But the parties may, if they choose, and the court consent, have the same matters inquired into by the court. This course was adopted in this case.

The plaintiff had been sued upon some of the notes given for the installments yet unpaid. Costs were incurred in those suits, and they were stayed by injunction in this action. The merits of the defense in those suits were necessarily gone into, on the trial of this action, and were found against the defendant. This court was bound to decide on what terms the plaintiff was entitled to the specific performance for which he asked. Certainly he was to pay the notes, and interest thereon, and also the costs unnecessarily caused by him in those actions, before he could be entitled to a deed. These are the terms imposed by the special term, with this addition only, that it is made imperative on the plaintiff to pay those notes, as it is also on the trustees to convey the lands to him by a

good and sufficient deed of conveyance. This affirmative relief it was in the power of the court to grant to the defendants It was also proper that the plaintiff should pay the costs, as he failed in showing any fault in the company.

With the views before stated, it is not necessary to notice the claim of Mr. Berrien to hold the notes as a bona fide purchaser. He received them, as he says, before maturity, in satisfaction of a debt previously due to him by the associates, for counsel fees. His counsel insists that the rule in *Coddington* v. *Bay*, (20 *John.* 637,) and in *Stalker* v. *McDonald*, (6 *Hill*, 96,) only applies where a note is taken as collateral security for an antecedent debt, and not where it is taken in payment, or satisfaction, of such debt. Such was not the opinion of the chancellor, in the last case. (*See particularly*, 6 *Hill*, 102.) The reason of the rule applies equally to each case. It is that the receiver of the note is to be protected only when he has lost his property or security by reliance on the note, without notice of any defense of the maker, to it. As soon as it should be ascertained that such defense existed, the receiver of the note would be restored to his original cause of action against his debtor, and so would sustain no loss, beyond that which would result from delay; for which the maker of the note should not be accountable. *Youngs* v. *Lee*, (2 *Kern.* 551,) professed to be in accordance with those cases. It did not intend to overrule them, or to give a new interpretation of them, and therefore, if not in accordance with them, is an accidental omission to apply the principles of those cases, but not a reversal of them. But in this case, if the title to the lands should fail, it does not appear but that the plaintiff has received a full equivalent for the notes given by him, in the use and enjoyment of the lands, the possession of which he still retains. He cannot, therefore, resist the payment of the notes.

The parties have chosen (probably because they relied on certain points of law as clearly in their favor,) to leave several matters of fact in comparative obscurity which might be easily cleared up. Among these, is the law of Florida as to trusts, and as to the words necessary to create an estate in fee; and

wi ther the common law or the civil law prevailed there, at the tim.e of these conveyances; also whether the actual recovery in the ejectment suit was of these or of other lands only; and if so, whether by the law of Florida the recovery is limited to lands of which the tenant to whom the notice is given is in possession, or includes all lands described in the action. The court has decided on the evidence before it. It may still be expedient for the parties to ascertain the precise facts in all those respects, and to insert them in the case.

The attention of the plaintiff is drawn to the fact that he has made no formal case; that he has not excepted to the finding of the special term, and has not procured there any finding of the facts and the law.

The judgment of the special term should be affirmed, with costs.

[New York General Term, February 12, 1857. *Mitchell, Roosevelt* and *Davies*, Justices.]

Paul *vs.* Hadley.

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In cases of executed sales of personal property, the common law rule is that the vendor is not liable for damages arising from latent defects known to him and unknown to the purchaser; except when the vendor has warranted the article sold, or has made false representations, or has used some active means to conceal such defects, or some artifice to mislead or deceive the purchaser in regard to such defects.

If the vendor is merely *silent*, he is not responsible for damages by reason of such defects. The rule of *caveat emptor* applies, in such cases.

APPEAL from a judgment of the St. Lawrence county court. The action was commenced before a justice of the peace.

In the spring of 1855 the plaintiff purchased of the defendant a bull, which was then two years old, for the sum of $10. The bull was purchased by the plaintiff for the use of his cows, and the defendant knew that the plaintiff bought him for that pur-

pose. When the bull was a yearling he got no calves. The defendant knew this fact and did not communicate it to the plaintiff, nor had the plaintiff any knowledge of it. After the plaintiff ascertained that the bull did not get his cows with calf, and later than is usual in the season, he drove 19 of his cows to another bull, at an expense of 25 cents each, and the service of this last animal was worth 50 cents for each cow. The cost of driving the 19 cows and use of bull amounted to $14.25, for which the justice rendered judgment for the plaintiff with costs. The defendant did not appear on the trial. On appeal to the St. Lawrence county court the judgment was affirmed, and the defendant appealed to this court.

Knowles & Chipman, for the appellant.

Dart, Dewey & Tappan, for the respondent.

By the Court, ROSEKRANS, J. There are two counts in the complaint: one alleged that the defendant sold to the plaintiff a 2 years old bull for $10, and falsely and fraudulently represented to the plaintiff that the animal was a good smart bull, when in fact he was useless as a bull and unable to get cows with calf, to the knowledge of the defendant, whereby the plaintiff sustained damages by putting his cows to said bull, and having to put them to another bull, causing them to come in late, and trouble and expense in driving them to another bull. The other count alleged that the bull was impotent and worthless as a bull and the defendant knew it, and falsely and fraudulently concealed this fact from the plaintiff, whereby the plaintiff sustained the damages set out in the first count of the complaint. No evidence was given to sustain the first count, and the evidence was wholly insufficient to sustain the second. If the animal was impotent when a yearling, it did not follow that he would remain so when he became two years old, and there was no evidence that the defendant had any knowledge of his impotency at the time of the sale. He was sold in the spring of his second year, before his powers were called into

exercise. The only evidence that the defendant knew the animal was impotent when he was two years old, was the fact that he got no calves when he was a yearling. But if the bull was impotent when he was sold, and the defendant knew that fact and did not communicate it to the plaintiff, it is questionable whether the action can be sustained. The only proof in the case is that the defendant *was silent upon that subject.* The rule is thus laid down in 1 *Parsons on Contracts*, 461: "If the seller knows of a defect in his goods which the buyer does not, and if he had known would not have bought the goods, and the seller *is silent and only silent*, although this is a moral, it is not a legal fraud. The weight of authority is that there should be some *active fraud.* The common law does not oblige a seller to disclose all he knows which lessens the value of the property he sells. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe, but if he be more than silent, if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law takes cognizance. The distinction seems to be, (and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions,) that the seller may let the buyer cheat himself *ad libitum*, but must not actually assist him in cheating himself."

Chancellor Kent lays down the rule somewhat differently. (2 *Kent's Com.* 484.) He says, "the writers of the moral law hold it to be the duty of the seller to disclose the defects which are within his knowledge, but the common law is not quite so strict. If the defects in the article sold *be open equally* to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee." "Where the means of information relative to facts and circumstances affecting the value of the article sold are equally *accessible to both parties*, and neither of them does or says any thing tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other, as to those facts and

circumstances, is not requisite to the validity of a contract." "The common law affords to every one reasonable protection against fraud in dealing, but it does not go the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." "*It requires the purchaser to apply his attention to those particulars which may be supposed to be within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention.* If the purchaser be wanting of attention to these points, when attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply." "And if the vendor be wanting in good faith, *fides servanda* is a rule equally enforced at law and in equity." Judge Story says, (1 *Eq. Jur.* § 207,) "The true definition of *undue concealment* which amounts to fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right not merely in *foro conscientia*, but *juris et de jure* to know." And in regard to the doctrine laid down by Chancellor Kent, that "as a general rule each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked or equally within the reach of his observation," he remarks, "that this doctrine, in this latitude of expression, may be thought not strictly maintainable or in conformity with that which is promulgated by courts of law and equity. (§ 208.) The doctrine of Chancellor Kent would seem to require some qualification, by limiting it to cases where one party is under some obligation to communicate the facts, or where there is some peculiar known relation, trust or confidence between them, which authorizes the other party to act upon the presumption that there is no concealment of any material fact." After stating the rule of the civil law to be as laid down by Chancellor Kent, Judge Story says, (§ 212,)

"In regard to intrinsic circumstances, the common law, however, has in many cases adopted a rule very different from that of the civil law, and especially in cases of sales of goods. In such cases the maxim *caveat emptor* is applied, and *unless there be some misrepresentations or artifice to disguise the thing sold, or some warranty as to its character or quality*, the vendor is understood to be bound by the sale, notwithstanding there may be intrinsic defects and vices in it materially affecting its value." And he adds, "however questionable such a doctrine may be in its origin, in point of morals or general convenience, (upon which many learned doubts have at various times been expressed,) it is too firmly established to be now open to legal controversy; and courts of equity as well as courts of law, abstain from any interference with it." Blackstone says, (2*d Vol.* 451,) "With regard to the goodness of wares purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good, or *unless he knew them to be otherwise and hath used any act to disguise them, or unless they* turn out to be different from what he represented to the buyer." He refers as authority for this doctrine to 2 *Roll. R.* 5. *Ross on Vendors*, 335 (*Law Lib. Vol.* 12, 172,) states the doctrine in nearly the same words as Blackstone. The case of *Fleming* v. *Slocum*, (18 *John.* 403,) relied upon by the plaintiff's counsel, decides nothing to the contrary of this rule as laid down in Blackstone and Story. The action was to recover damages for fraudulent concealment of the bad qualities of a stove, and the plaintiff was unable to prove the fraudulent concealment, and was nonsuited for that reason. Upon a motion to set aside the nonsuit, the only question was whether the proof was sufficient to sustain the action. The only ground upon which the allegation of a fraudulent concealment was founded, was the round price paid by the plaintiff for the stove. Ch. J. Spencer says, "That when it is made to appear that a vendor has been guilty of fraudulent concealment of a material fact, to the injury of the vendee, an action at law can be sustained to recover damages," and "a *suppressio veri* is equivalent to a *suggestio falsi*." But he adds, "it is the plaintiff's misfortune that he did not expressly

guard against the imposition practiced upon him, or that he has no evidence of *any representations* made to him by the defendant. He omits however to define what is in law a *fraudulent* concealment or *suppressio veri*, and the case did not call upon him to do so. *Aliud est celare, aliud tacere.*" The rule laid down by Chancellor Kent, that each party to a sale is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open or naked, or equally within the reach of observation, was subsequently, in a note, qualified so as to confine the obligation to declare such facts to a party who was under some obligation by confidence reposed or otherwise, to communicate them fairly and truly. (2 *Kent's Com.* 482. *Bench* v. *Sheldon*, 14 *Barb.* 72.) The rule thus qualified is conformable to that cited above from *Parsons on Contracts* and *Story's Eq. Juris.* The remark of Johnson, J., in *Bench* v. *Sheldon*, (*supra*,) that "in the case of sales of property, the law presumes the purchaser reposes confidence in the vendor as to all such defects as are known to the vendor, and are not within the reach of ordinary observation, and therefore imposes upon him the duty to declare fully and fairly his knowledge of such defects," was not called for by the case, and is not supported by any citation of authority from common law elementary works, or common law decisions. It has been held that a *purchaser* is not bound to declare to the vendor any intrinsic or extrinsic fact or circumstance peculiarly within the knowledge of the purchaser, which would enhance the value of the property sold, and which if known to the vendor would prevent the sale. (*See Fox* v. *Macreth*, 2 *Bro. C. C.* 420; *Turner* v. *Harvey*, *Jacob's R.* 178; *Laidlaw* v. *Organ*, 2 *Wheat.* 178; *Bench* v. *Sheldon*, *supra.*) The purchaser may be silent in relation to such facts and circumstances and avail himself of his superior knowledge. All that is required of him is that he should do no act calculated to mislead the vendor. He is not authorized to practice any imposition upon the party with whom he is dealing, or in the language of the authorities above cited, is not to be guilty of any active fraud. I am unable to conceive of any reason in law or morals

why the rule should be more stringent upon the vendor than upon the vendee. In cases of executed sales the common law rule is, I conceive, that the vendor is not liable for damages arising from latent defects known to him and unknown to the purchaser, except in cases where the vendor has warranted the article sold, or has made false representations, or has used some active means to conceal such defects, or some artifice to mislead or deceive the purchaser in regard to such defects, and that if the vendor is merely silent he is not responsible for damages by reason of such defects. The rule of *caveat emptor* applies in such cases. The recent case of *Keates* v. *Cadogan*, (2 *Eng. L. & Eq. R.* 318,) is based upon a similar principle. In that case the defendant, knowing that a house belonging to him was in a ruinous state and dangerous to occupy, and that its condition was unknown to the plaintiff, and that the plaintiff took the house for the purpose of residing in it, leased it to the plaintiff without disclosing to him the condition of the house. The plaintiff took possession of the house, and soon after a portion of it fell down and was not habitable, and the plaintiff brought an action on the case, alleging these facts, and that it was the duty of the defendant to have disclosed to the plaintiff the ruinous and dangerous condition of the house. Upon demurrer it was held that the plaintiff could not recover; that there was no obligation on the part of the defendant to say any thing in regard to the state of the house, and as there was no warranty that the house was fit for immediate use or any misrepresentation made by the defendant, the action would not lie. There are cases where goods are purchased for a particular purpose, in which the vendor will be held responsible in case the goods are not fit for the purpose for which the purchase is made. The plaintiff in this case, however, cannot avail himself of this rule, for the reason that he sets up no such claim in his complaint, and as the defendant did not appear in the suit he has not waived any right to raise the objection here. The proof given, that the plaintiff purchased the bull for the use of his cows, and that the defendant knew that the plaintiff purchased for that purpose,

was not admissible under the complaint, and the judgment should be reversed for that reason, if for no other.

Judgment of the county court and of the justice reversed, with costs.

[Saratoga General Term, January 6, 1857. *C. L. Allen*, *James*, *Rosekrans* and *Paige*, Justices.]

Lorillard *vs.* Lorillard and others.

In 1853 D. the receiver of certain real estate, pursuant to an order of the court, executed a lease thereof to H., for 21 years from the 1st of May following, at an annual rent of $14,500; the lessee to pay all taxes and assessments, and to erect a building to cost at least $10,000, which was to belong to the owners of the land. The building was erected at a cost of about $30,000. Before the commencement of the term H. assigned the lease to M. for the whole term, save one day only. The assignment was subject to the rents, covenants and conditions mentioned in the lease. M. entered into possession and collected the rents. He paid the annual rents to the receiver until May 1, 1855; at which time, he declined making any further payment of rent at the rate agreed, but offered to the receiver to surrender the lease, and take a new one at $8000 a year. On the petition of the receiver, for advice and direction in the premises, it appeared that H. the original lessee, was irresponsible, and that more than three-fifths, in interest, of the owners of the property concurred in the application of the receiver and were in favor of accepting the offer of M., and nearly two-fifths in interest opposed it. The court refused to give its assent to the arrangement.

Held also, that if M. the assignee, wished any favorable terms from the court, he should first pay all the rent in arrear, at the rate of $8000 a year, and all taxes and assessments, and surrender the lease; procuring a surrender from H. also. That if the parties interested were willing to accept that inferior sum, then M. might be discharged from further liability; and that the receiver should thereupon immediately advertise the premises to lease, for the residue of the term, at auction.

Held further, that if M. did not consent to this, the receiver should immediately proceed to eject him and the occupants under him, by an action to recover the land and its profits; or in some other suitable way.

APPEAL from an order made at a special term, upon the petition of Ezra P. Davis, the receiver in this cause, on the 5th day of December, 1856.

George Lorillard, by his will, gave annuities of $500 each to certain of his grand nephews and nieces. These persons were not made parties to the suit involving the validity of his will; and consequently their annuities were not affected by the decision which declared the will void. (*See* 14 *Wend.* 294, 397.) These annuities are now eleven in number, or $5500 per year. It was conceded and declared, in both that suit and the partition suit, that these annuities were a legal charge upon the whole estate. Consequently, when the estate was divided, three lots, viz. No. 200 Broadway, 42 West street, and lot No. 212 Broadway, were set apart by order of the court, and placed in charge of Nicholas Dean, as receiver of the court of chancery, to let the same and receive the rents, and pay expenses, taxes and commissions; and then to pay the annuities and divide the surplus. The parcels 200 Broadway and 42 West street have since been sold by orders of the court, and the proceeds divided, and the lot 212 Broadway alone remains. This lot is on the northeast corner of Broadway and Fulton street, and contains 29 feet in width by 77 feet in depth. Mr. Dean, in January, 1853, leased this lot at auction for twenty-one years, to Edward H. Hudson, at a ground rent of $14,500—the lessee to erect a building which should revert to the receiver, and also to pay taxes, make repairs, pay insurance, &c. Hudson was irresponsible, and borrowed from Mr. Francis Morris the means to erect the building, and in March, 1853, assigned the lease to Morris for the residue of the term, (save and except the last day,) Morris also reserving the right to surrender the lease, if he should think proper, at any time after three years. Morris paid the rent until the 1st of May, 1855, and then declined to make further payments under the lease, alleging that the rent was an exorbitant one; and Mr. Dean, then the receiver, being advised that Morris was not legally liable on the covenants of the lease, and being also convinced of the equity of his application for a reduction of the rent, agreed, with the concurrence of many of the heirs, to apply to the court for power to reduce the rent to $8000. Upon Mr. Dean's decease, the present petitioner was appointed receiver, and he instituted

the present proceeding—with the concurrence of a majority of the heirs—in order to carry into effect and to secure the benefits of the arrangement made by Mr. Dean. The petition was referred to Mr. Ruggles, to take proofs; and upon return of his report, with the proofs annexed, Judge CLERKE, at special term, confirmed the report and ordered the receiver to accept a surrender of the old lease, and to give a new one on the terms proposed by Mr. Morris. From this order some of the heirs appealed.

Benj. T. Kissam, for the appellants.

A. P. Man, for the receiver.

By the Court, MITCHELL, J. Mr. Dean, the receiver of certain real estate in this cause, pursuant to an order of the court, in January, 1853, executed a lease of the property on the N. E. corner of Broadway and Fulton streets, to E. H. Hudson, for 21 years from the 1st of May following, unless certain annuitants should sooner die, at the annual rent of $14,500, payable quarterly; the lessee to pay all taxes and assessments, and to erect a building to cost at least $10,000, which was to belong to the owners of the land. The building was erected at a cost of about $30,000, probably including in that cost interest and rent during its erection. Francis Morris advanced to Hudson all the moneys expended by him on the premises, and as his security, took an assignment of the lease, in March, 1853, for the whole term, save only one day. The assignment reserves no rent to the assignor, is for no consideration but $1, and has, immediately after the *habendum* clause, the following words: "*subject*, nevertheless, to the *rents*, *covenants*, conditions and provisions therein also mentioned," with a proviso that Morris might surrender at the end of three years. Morris immediately entered into possession, and has collected all the rents. He paid the annual rents, to May 1, 1855, inclusive. He found (as is said) that the rents received by him would not pay the ground rent and taxes, and offered to the receiver, in May, 1855, to

surrender the lease and take a new one at $8000 a year, and the receiver is said to have agreed to apply to the court for authority to make such arrangement. In August following, Morris paid $2000, subject to the completion of such agreement. Since that time he has paid nothing, but has received the rents, and retained them. Mr. Dean died soon after that date, and the present receiver, Ezra P. Davis, was appointed in his place. In September last, he applied to the court for leave to carry out the arrangement proposed by Morris, so as to take effect as of the 1st of May, 1855. Mr. Morris then to pay the back rents at the rate of $8000 a year, and the taxes and assessments.

A little more than three-fifths, in interest, of the owners of the property, concur in the application of the receiver, and nearly two-fifths, in interest, oppose it. The referee, and the court at special term, have approved it. Still it appears to this court inexpedient to give its assent to such an arrangement. The rent of $14,500 was obtained at auction; some persons bidding $14,000, and others running it up from that sum by $100 at a time, to the last bid of $14,500. There is no evidence that property has since fallen in value, or that if the same trial *by auction* should be made, the same rent, or one far exceeding $8000, could not be obtained; except that witnesses estimate the gross annual rents at from $10,500 to $15,000, and the annual expenses at an average of about $3750. The same witnesses would probably have put the same estimate on the property before it was leased at auction, and yet persons bid against the lessee to the amount of $14,000 and $14,400. And Mr. Morris then thought so favorably of the lease as immediately to take an assignment of it for all the term, except one day, as his security for nearly $30,000. As Hudson is, and probably was, entirely irresponsible, Mr. Morris must have valued the lease as worth to the lessee more than $30,000. Other persons may estimate it in like manner at auction, or at least think that after the $30,000 are expended on the premises they can manage it so that it will pay the rent obtained at auction in 1853, before that money was ex-

pended on it. Under these circumstances, the court consider the only fair test of value is an auction.

It is said that Mr. Morris now offers to pay $8000 per annum now in arrear for nearly two years, and the taxes and assessments for the same period, and that for this advantage to the estate the three-fifths owners desire to complete the arrangement with him; and that he cannot be made liable as assignee, as the whole term was not assigned to him, and he did not covenant to pay the rent. It is not necessary to decide whether he would be liable as assignee, or not, under the circumstances already detailed, and such others as they afford ground to infer. There is just reason to infer that Hudson was the mere instrument of Morris, and that in fact no title of any kind was intended to vest in him. Before his term was to commence, he had transferred his interest in it to Morris for the whole period except one day (the exception being of no benefit to him, and only intended to save Morris from liability as assignee.) He never was in possession for a single day, or expended one dollar upon the premises, or received one dollar from it. Morris immediately entered into possession, collected all the rents, and paid all such rent as has been paid to the lessor. He alone offers to surrender the lease; he alone has received and kept the rents since May 1, 1855. Whether liable or not, under these circumstances, in the old common law action, as *assignee*, it is very possible that he may be liable now on a complaint showing all the facts, his liability to Hudson, Hudson's irresponsibility, and that the assignment was expressly subject to the payment of the rents. If he could not be made liable after he surrendered the premises, it may be that while he continued in possession of the lands thus received by him expressly subject to the rents, he was bound to Hudson to pay such rents, or at all events to apply the rents received by him to such payment; and that under our present system the lessor could enforce, in his own favor, that obligation to Hudson. So, too, the rents being unpaid, ejectment lies to recover the lands; and as Morris is the person in possession and collecting the rents, may they not be collected from him, in the

same action, under a claim for the mesne profits. As he is not a party to these proceedings, the court does not choose to express its opinion, definitively, on these matters.

To authorize the proposed arrangement, would encourage Mr. Morris and all other persons tenants under a lease sanctioned by this court, first to refuse to pay their rents, next to propose to substitute inferior obligations in place of those they had entered into, and then (as in this case) to urge that, inasmuch as they had taken their measures from the beginning, to reap all the benefits of the lease, and yet to evade its liabilities, and had kept back rents which they had collected and should have paid over, for nearly two years, it became the interest of the parties to acquiesce, and they might thus force the parties and the court to submit to their terms. If Mr. Morris wishes any favorable terms from the court he should first pay all the rent in arrear, at the rate of $8000 a year, and all taxes and assessments, and surrender the lease, procuring a surrender from Hudson also. And as it is understood that the parties interested are willing to accept that inferior sum, then he might be discharged from further liability. The receiver then should immediately advertise the premises to lease for the residue of the term, at auction, on the same terms mentioned in the present lease; except that the lease should require the present building to be sustained, or a new one equally good to be kept erected. Security should also be required for the payment of the rent, &c., either by one or more sureties, or by a deposit, of some kind.

If Mr. Morris does not consent to this, the receiver should immediately proceed to eject him and the occupants under him, by an action to recover the land and its profits; or in such other way as he may be advised. It is not proper now to say whether the court would not give summary relief against him, as one holding under the court, and subject to its jurisdiction.

The order appealed from should be modified accordingly.

[New York General Term, February 12, 1857. *Mitchell*, *Roosevelt* and *Davies*, Justices.]

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Moore *vs.* Cross and McGervey.

Where goods are sold by A. to B. on the credit of C., and C. with full knowledge of that fact and intending to become surety for B. on the purchase, indorses the note made by B. to A., such indorsement, read in connection with the note, is a written contract "for value received," binding the indorser to pay in case the maker does not; provided a demand of the maker be first duly made, and notice of protest duly given to the indorser. Davies, J., dissented.

The payee in such a case, if strict form is insisted on, has a right to indorse his name on the back of the paper, "without recourse," and then to bring a suit thereon, not as payee, but as holder; especially if he sets forth in his complaint, and proves, all the facts which show that such was the understanding of the parties, and that the merchandise was delivered upon the faith of it.

Such an instrument, both in fact and in legal effect, is at once a written receipt for the goods under the name of "value," and a written promise on the part of the maker and indorser to pay for such value; the former absolutely, and the latter conditionally.

APPEAL from a judgment entered at a special term, upon the report of a referee. Anthony McGervey, a dealer in coal, applied to the plaintiff to buy coal. He had been previously dealing with George Garvin, on the faith of Cross's indorsement, and had been recommended by Garvin to apply to Moore, for coal. The plaintiff offered to sell it to him for paper to be indorsed by Cross. McGervey applied to Cross, with whom he had dealings, informing him of the proposition. Cross thereupon drew up, in his own handwriting, two promissory notes, one dated September 9, 1851, payable at four months, for $500, to James Moore, or order; the other dated September 27, 1851, payable at three months, for $300, to James Moore, or order, and McGervey signed them. Cross then indorsed them in blank, and handed them to McGervey, to be delivered to the plaintiff for coal. They were so delivered; and the coal was received by McGervey, and all parties understood that it was sold on the strength of Cross's indorsement. Moore got a friend of his, named McNamee, to indorse them for his accommodation, and got them discounted at the Atlantic Bank, through McNamee's account. When they became due they were protested in the usual way, and notice of demand and non-payment in the usual manner given to the indorser, Cross. The

plaintiff took them up from the bank, commenced suit on them against the maker, as maker, and against Cross, setting forth the contract of indorsement. McGervey did not appear in the suit. The defendant Cross answered, putting in issue, 1st. The presentment for payment to the maker, at maturity, and asserting, 2d. That he was an accommodation indorser for the plaintiff's benefit, for purposes of discount; that the plaintiff knew of it, and got the notes discounted for his own benefit, and afterwards took them up. 3d. That the defendant was second indorser, and was not liable to the plaintiff, who was first indorser. 4th. That McGervey paid the notes to the plaintiff by an order for coal. 5th. That the maker had not given these notes to the plaintiff to pay for coal with the defendant's knowledge. Issue was joined, cause referred to Lucius Robinson and tried. The referee found for the plaintiff. Appeal was taken to the general term, which reversed the judgment, on the ground that the evidence given on that trial was insufficient to show a liability on the part of Cross. Upon that decision the plaintiff moved and had his complaint amended, upon which issue was joined. The cause was again tried before the same referee. The plaintiff produced, on the trial, the notes in suit, proved their presentment and demand for payment, non-payment and notice of protest. He proved also, that the plaintiff and defendant McGervey, were coal dealers; that the notes were drawn up in Cross's handwriting, indorsed by Cross for McGervey's accommodation, to be given to Moore in payment for coal sold on the faith of those indorsements, to which contract of sale Cross was privy and assenting. Upon these and other facts the plaintiff rested. The defendant Cross introduced no evidence, and the referee found for the plaintiff a second time. From the judgment entered upon his report, Cross appealed. The appeal was first heard at a general term held in the first district, in October, 1856, before Justices ROOSEVELT, CLERKE and DAVIES, and on the 3d day of November thereafter, a majority of the court (Justices CLERKE and DAVIES) united in a decision reversing the judgment of the special term, ROOSEVELT, J., dissenting. The plaintiff ap-

plied for a re-argument, which motion was granted. The cause coming on for re-argument, at the general term in February, 1857, the presiding justice (MITCHELL) stated that the court had concluded not to hear the case re-argued; that as it presented questions which would doubtless lead the parties to carry the case to the court of appeals, he should adopt *pro forma* the opinion of Justice ROOSEVELT, (which follows,) and vote for an affirmance of the judgment below. Justice DAVIES said he should adhere to the opinion given by Justice CLERKE, on the first hearing.

P. V. Remsen, for the appellant.

D. McMahon, jun., for the plaintiff.

ROOSEVELT, J. It is an error as it seems to me to say that this is a suit by a payee, as payee, against an indorser. Stated nakedly in that form the proposition involves at first view the absurdity of a principal suing his own surety. The plaintiff in this case, although in fact payee of the notes, does not sue *as payee* but as *indorsee* and *holder*. Ordinarily, no doubt, a prior party cannot sue a subsequent party to a note. But the reason on which the rule is founded will show that the rule is not applicable to a case like the present. Where a subsequent indorser pays a note he is usually entitled to a remedy over against the prior parties as for moneys paid to their use. And to prevent circuity of action, therefore, they are not allowed to sue him when the very recovery would constitute in turn the basis of an action for precisely the same amount against them.

In this case, however, if Cross, the indorser, should be made to pay Moore, the payee, would he have a claim against Moore to be reimbursed? Clearly he would not. He would only have paid to Moore a debt which he justly owed to Moore; and as to which, as between him and Moore, on the facts proved, he was as much a principal as McGervey, the maker of the note.

The referee, whose decision is appealed from by the defendants, reports that previous to the making and indorsing of the

notes, McGervey applied to Moore to purchase from him a quantity of coal, and that Moore agreed to sell it to him "provided he would give him, in payment for the same, paper indorsed by the defendant, John A. Cross." Both Cross and McGervey agreed to the condition; both made, indorsed and delivered the notes with that understanding, and they both obtained the coal from Moore, on the credit of both, and more especially of Cross. The referee reports expressly that "the notes were indorsed and delivered by Cross with the intent of procuring for McGervey a credit with the plaintiff for the coal." How then could Cross, if he paid the notes to Moore, turn around upon Moore to refund?

It was the clear intention of the parties, that Cross, if he paid the note as indorser, was to have recourse to McGervey, the maker, and not to Moore the payee; and that Moore, if he afterwards, for form's sake indorsed it also, might add to his indorsement the words "without recourse." That such an indorsement would have been regular, and matter of right, was expressly held by the chancellor, in *Hall* v. *Newcomb*, (7 *Hill*, 419.) And it was further held, that the effect of such special indorsement would be to leave the second indorser liable to a *bona fide* holder, and without any remedy over against the payee.

Something has been said about the statute requiring certain contracts to be in writing, and among them "every special promise to answer for the debt, default or miscarriage of another person." And is not Cross's contract in writing? By the terms of the note it will be recollected McGervey promised for value received to pay Moore eight hundred dollars, and Cross, who himself wrote the notes, at the same time and before delivery to Moore, and before and without any previous indorsement by Moore, put his name on the back of them knowing that the coal would only be sold on his credit. Did not Cross by such an indorsement promise in writing, under the terms "value received," to pay Moore for the coal about to be delivered to McGervey? Was there any other condition, express or implied, in his engagement, except the usual condition attached to all cases of general indorsement? Was not the whole instrument,

taken togther, the face and the indorsement, "a note of the contract made in writing, (as the statute requires) expressing the consideration, and subscribed by the parties to be charged?" That the words "value received" are a sufficient expression of the consideration to comply with the statute, was decided in *Douglass* v. *Howland*, (24 *Wend.* 35,) and that their insertion in the body of the note instead of immediately over the indorser's signature on the back, is also sufficient was decided in *Parks* v. *Brinkerhoff*, (2 *Hill*, 663.) The instrument then, when handed to Moore, both in fact and in legal effect was at once a written receipt for the coal under the name of "value" and a written promise on the part of both McGervey and Cross to pay for such value, the former absolutely, and the latter conditionally. A promise in both its parts too clearly binding, both in law and justice, to require any argument.

A further answer, however, to the objection is, that Cross's agreement was to pay not "the debt of another," as the statute expresses it, but his own debt. The whole transaction was simultaneous. The sale was on the credit of Cross. It was not a case of pre-existing indebtedness of McGervey, which Cross engaged to discharge. Cross in effect said to Moore, "if you will sell and deliver to McGervey a cargo of coal on three and four months' credit, I will pay you for it, provided you shall first make your demand of him and give me immediate notice of his neglect or refusal." In the case of *Spies* v. *Gilmore*, (1 *Comst.* 321,) the court of appeals held that where a party without any special words of guaranty, puts his name on the back of a note as first indorser, he not being the payee, but intending to be surety to the payee, the effect of the transaction is to charge him, not as an absolute guarantor, it is true, but as an ordinary indorser, entitled like other indorsers to notice of protest.

The whole reasoning of the court in that case *assumes* that had there been a regular demand of the maker, and due notice of protest to the indorser, no question could have been made as to the liability of the indorser. A mere blank indorsement not strictly in form according to commercial usage creates, it was held, (and such no doubt is the intention of the parties in such

cases.) no other or greater liability than it would have created had the usual custom been pursued of making the paper payable in the first instance to the intended indorser instead of immediately to the intended payee.

In the case of *Hall* v. *Farmer*, (2 *Comst.* 553,) the note was not indorsed in blank but was specially guaranteed. It was also for an existing debt of the maker, a balance of account. The agreement of guaranty was written out both in form and substance as a guaranty, and that too before and not after it was signed by the surety. It was therefore, in all its parts, an express written contract excluding all implication and all room for parol proof to add to or vary its terms. No consideration was stated in it, and no new credit either in value or time was given upon the strength of it. The body of the note was a mere promise, fixing no period of payment and of course giving no indulgence, on the back of which was indorsed the words, "we the undersigned guaranty the payment of the within. John Farmer, H. W. Doolittle." No value received was admitted in writing, and none existed in fact. The engagement, as respected all the parties, was purely gratuitous, and purported to be nothing else. Such an engagement every body knows, however binding in honor, cannot be enforced in law. The decision, therefore, "*as might have been expected*," was in favor of the defendants, but as the reporter's note says, it settled no general principle. Whether the judgment was founded on the want of consideration in fact for the promise, or on the want of consideration "expressed," (both of which objections existed,) does not appear. The judges were divided, three to four, and one (Judge Bronson) gave no opinion. The majority also, as to the grounds of decision were divided among themselves. The reasons of the majority were not given at length, except by a reference to the previous case of *Durham* v. *Manrow* at page 533 of the same volume, which was a case also of express written guaranty, in the words, "we guaranty the payment of the within note." This guaranty, however, unlike the other, was given in payment for a horse. "It was part of the bargain for the horse and, with the consent of *Moulthrop*, [the surety.] The two engaged

ior the payment of the debt of one of them in a particular way. In substance it was a direct original undertaking." Such is the language of Judge Strong, adopted by the majority of the court of appeals, in affirming the judgment of the supreme court, which held the defendants liable on the guaranty, not withstanding that the consideration was not expressed in the undertaking. And yet this decision in favor of the then plaintiff Durham is cited as authority against the now plaintiff Moore. As I read it, its purport is precisely the reverse. It holds in effect that *no writing was necessary for the promise*, and as a consequence that the consideration in such case, if there be one, in fact, need not be expressed in writing. Parting with the horse was the consideration, and that was on the faith and credit of the guarantors. The cases of *Parker* v. *Bradley*, (2 *Hill*, 584,) and *Kingsley* v. *Balcome*, (4 *Barb.* 131,) are to the same effect.

The plaintiff's complaint in the present action, as originally framed, was merely on the notes, averring demand and protest, and due notice to Cross as indorser, no part of which statement was denied. Cross in his answer defended himself on the ground that Moore was the payee, and that he had indorsed the paper for Moore's accommodation and not McGervey's, which, if true, would have been a perfect defense. But, as we have seen, it was not true. He indorsed the notes to accommodate McGervey and secure Moore, and not to accommodate Moore and secure the bank. Cross's account of the transaction on this point, as set up in his answer, is shown by the proof and found by the verdict to have been at variance with the fact. Had it been sustained by the evidence it would have been not only a legal but a just defense. Being unsustained it was of course no defense, either just or otherwise. Failing in that attempt, Cross then placed himself on the supposed general rule of law that the payee of a note cannot sue an indorser. To meet this objection, and bring the case within the exceptions to the rule, the plaintiff by permission of the general term amended his complaint, by adding a special statement of the whole transaction. On that complaint, and not on the complaint as originally framed,

the rights of the parties are now to be disposed of. The proceeding in its present shape, to use the ancient phraseology, is an action on the case, a quasi bill in equity, in which mere form is to be disregarded, and justice to be administered according to the substantial rights of the parties. The court is to look not to the mere note, nor to the usual rules of pleading on mere notes drawn in the ordinary way, but to the whole contract express and implied, of which the sale and delivery of the coal, with their attendant circumstances, as well as the note and the peculiar manner of making, indorsing and delivering it, formed important parts.

Viewing the case in this light, the whole case and not a mere fragment, it is perfectly clear, (as it seems to me, to use the language of the referee,) that when Cross wrote, indorsed and delivered the notes, he intended one of two things, either to bind himself to pay Moore the amount of them, or else to defraud him out of the coal which he knew was sold on the strength of his indorsement. The court must now determine which of these intentions it will carry into effect. A decision in favor of the latter of the two would, in my judgment, be something new and much to be deplored in the history of the administration of justice. The judgment for the plaintiff should be affirmed with costs.

MITCHELL, P. J., concurred.

DAVIES, J., dissented, for the reasons stated in the following opinion, delivered by Justice CLERKE, on the first hearing, which opinion was adopted by Justice DAVIES, as expressing his views.

CLERKE, J. This is an action on a promissory note, by the payee against McGervey as maker, and Cross, whose name appears as indorser. The defendant Cross is liable, if at all, either as indorser or as guarantor.

As the complaint now stands, it appears that the promissory note in question was made by McGervey, payable to the order of Moore, (the plaintiff,) and was indorsed by Cross, in blank.

at the time it was delivered to the plaintiff, for the purpose of paying for coal, sold and delivered by the plaintiff to McGervey, on the credit of this indorsement. The note is the gravamen of the action; the circumstances, under which it was given, are merely its incidents.

I. The defendant Cross cannot be made chargeable as indorser. (*Herrick* v. *Carman*, 10 *John.* 224. *S. C.* 12 *id.* 159. *Ellis* v. *Brown*, 6 *Barb.* 282.) It would be inconsistent with the principles which have always prevailed in commercial law, relating to negotiable paper, if a subsequent indorser, as such, could be liable to a previous indorser. This seems to me inseparable from the nature and form of the instrument, and from the qualities which the law impresses upon it. It is negotiable and transferable, by indorsement in blank; and as each holder tranfers and indorses it to the next, he makes himself liable, from the terms of the contract, only to such, or any subsequent holder, to whom it is successively transferred, unless, by indorsing it "without recourse" he exempts himself from all liability connected with it; so that it would be at variance with the essential properties of negotiable paper, and would be reversing the established order of liability, to make a subsequent indorser liable to a preceding one. In short, a subsequent indorser cannot be responsible to a previous indorser, any more than such previous indorser can be made responsible to the maker.

In *Hall* v. *Newcomb*, (7 *Hill*, 416,) the marginal note of the reporter contains an erroneous statement of the decision of the court, and of the import of the chancellor's opinion. It is stated in the note, that on an indorsement, analogous to that under consideration in this case, the indorser could not be made liable to the payee as guarantor or maker, "*but only as indorser.*" There is nothing in the decision, or in any of the opinions delivered by other members of the court, to warrant the assertion that an action can be maintained against him as indorser by the payee. The only question before the court was whether he could be sued as guarantor or general surety. No notice of non-payment had been served upon the defendant; and

to repair the consequences of this omission, the holder of the note (being also the payee) declared against him in one count as maker, and in another as guarantor. The court for the correction of errors decided that the action on these counts could not be sustained; affirming the decision of the N. Y. common pleas and that of the supreme court. The chancellor, in his opinion, expressly states, that a second indorser "can in no event be made legally liable to the first indorser." He adds, "when such a note is presented to the accommodation indorser, and is indorsed by him, without having been previously indorsed by the person to whose order the same is payable, the latter may, at the time he puts his indorsement upon it, indorse it specially without recourse to himself; so as to leave the second indorser liable to any person into whose hands it may subsequently come for a good consideration, and without any remedy over against the first indorser;" and again, "or if the object of the second indorser was to enable the drawer, as in this case, to obtain money from the payee of the note upon the credit of such accommodation indorser, he may indorse it in the same way, 'without recourse,' and, by such indorsement, may either make it payable to the second indorser or to the bearer. And such original payee may then, as the legal holder and owner of the note, recover thereon against such second indorser, *upon a declaration stating such special indorsement of the note to him by the second indorser.*" No such machinery has been employed in the case under consideration; and if the plan suggested by the chancellor had been adopted by the payee of this note, I doubt whether it would have been, at this day, held available. The suggestion was a mere *dictum*, not at all necessary to the decision of the point under discussion, and was pronounced by Senator Bockee as "a sort of finesse and shuffling game," below the dignity of the law. As that senator very properly remarked, "we have no right to resort to practices changing the character and liability of parties." People must learn to make their own contracts, and to make them in conformity with the law. Otherwise courts of justice will become a resort for the reparation of blunders, which the exercise of ordinary caution

can at all times prevent, instead of being the dispensers of a settled and enlightened system of jurisprudence, founded on great general principles of justice and utility. The disturbance of general principles on subjects in relation to which general principles manifestly exist, is productive of much greater evil than the detriment which individuals may occasionally suffer from their unwavering application.

II. Neither is the defendant (Cross) liable as guarantor. The question involved in this part of the subject, is now set at rest in this state. In the case above referred to, *Hall* v. *Newcomb*, (7 *Hill*, 416,) it was expressly decided, in the court for the correction of errors, that "where a man writes his name in blank upon the back of a negotiable promissory note, he only agrees that he will pay the note to the holder, on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. *Mere proof that he indorsed the paper to enable the maker to raise money on it, does not change the nature of his legal liability as indorser*, where the note is in the hands of a *bona fide* holder for a good consideration. For the courts to allow parol proof to charge a mere surety, beyond the legal effect of his written blank indorsement on such paper, would bring them in direct conflict with the provisions of the statute of frauds." (2 *R. S.* 135. § 2, *subd.* 2.) The doctrine of this case is fully recognized by the court of appeals in *Spies* v. *Gilmore*, (1 *Com.* 321.) The subsequent cases of *Durham and Moulthrop* v. *Manrow*, (2 *id.* 533;) *Hall* v. *Farmer*, (*Id.* 553,) and *Brewster* v. *Silence*, (4 *Seld.* 207,) relate to the effect of a guaranty in express terms upon the back of the note, without stating the consideration, as "we guaranty the payment of the within note." In the first of these cases, it was proved that Durham, (one of the defendants below,) was the payee of the note; that he had purchased a house of the plaintiff on the day the guaranty was dated, and, in part payment therefor, transferred to him the note with the guaranty indorsed thereon. Moulthrop, the other defendant, signing the guaranty at the request of, and as surety for Durham. The court decided that it was valid, on the ground that an original consideration, in fact, was proved;

and this decision would be analogous to the case before us, in relation to the liability of Cross as guarantor, if a guaranty in express terms, instead of a blank indorsement, was written on this note. The next case, *Hall* v. *Farmer and Doolittle*, (2 *Comst.* 553,) was similar to *Durham and Moulthrop* v. *Manrow*, as to the form of the guaranty; but, it was proved that it had been given for an antecedent debt; and the court, consequently, decided against the validity of the guaranty. The last reported case in the court of appeals on this subject, I believe, is that of *Brewster* v. *Silence*, (4 *Seld.* 207.) It overrules *Durham and Moulthrop* v. *Manrow*, and expressly decides, that the guaranty, in all cases, *must be in writing* in direct terms, and must express the consideration upon which it is made, and that the consideration cannot be supplied by parol proof. *A fortiori*, it cannot be supplied, as in the case before us, where there is no express guaranty, but merely a blank indorsement.

It is plain, therefore, that the plaintiff cannot recover, while any respect is to be shown to established principles, and to a current of authority in the highest court of appellate jurisdiction. Something was said about the right of the plaintiff to reform this contract, so as to place the name of the defendant Cross on the note as a previous indorser, and, I suppose, also to substitute his name as payee, instead of that of the plaintiff. I need scarcely say, that if this can be done at all it cannot be done in this action. The action has not been brought for any such purpose; and of course, the defendant has had no opportunity of adducing evidence, or of being heard, upon such a suggestion. Although we have abolished the old forms of action, we have not abolished allegations and proofs. In other words, we have not abolished the right of defense in courts of justice

The judgment should be for the defendant with costs.

Judgment affirmed.

[New York General Term, February 12, 1857. *Mitchell*, *Roosevelt* and *Davies*, Justices.]

BILLINGS *vs.* VANDERBECK.

23 546
37 490
53 544
21h 162
36a 375

An accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for a breach of it.

In case of a note, or similar obligation, payable in specific articles, where nothing is to be done by the creditor but to receive performance, a tender of the articles at the time and place appointed for performance discharges the debt; the property becomes the payee's and the maker holds the same as his bailee, and at his expense and risk.

This rule prevails where the relation of debtor and creditor exists. But the doctrine does not, as a general rule, apply to cases of contracts executory on both sides.

An agreement, by which A. promises to deliver to B. certain property mentioned therein, at a specified time and place, and B. agrees to accept the property at the time and place specified and deliver certain promissory notes of A. to him, is valid; the mutual stipulations constituting a sufficient consideration. And if A. tenders performance, on his part, at the day and place, and B. fails to accept, or to perform on his part, a cause of action arises in favor of A. for such damages as he has sustained by B.'s breach of contract.

The rule of damages, in such a case, is the difference between the contract and the market price of the property at the time fixed for delivery. If there is no evidence as to the value of the property, the plaintiff can recover only nominal damages.

APPEAL from a judgment entered at a special term, upon the report of a referee. The complaint alleged that on the 19th of March, 1852, the plaintiff purchased of the defendant, at auction, a horse, a mare, a double wagon, drag and double harness, for the aggregate sum of $164.75, for which he gave to the defendant his promissory note, with two other persons as sureties, payable on the first of November, 1852, with interest. That on the sale of the mare, the defendant warranted her to be sound and eleven years old. That the plaintiff, confiding in the defendant's representations, bid her off at $47. That some time after the sale the plaintiff discovered that the mare was unsound, and more than eleven years old, and that, to recover the damages which he had sustained by reason thereof, he commenced a suit against the defendant, in a justice's court. That issue was joined in that suit, and the trial thereof adjourned until the 31st of May, 1852, when the parties appeared

and by and between themselves settled the suit before the said justice, in the following manner, and by the following agreement, to wit: "James Billings agrees by 2 o'clock P. M. to-day, to deliver to Andrew A. Vanderbeck at the place where the said property was sold by said Vanderbeck, the chattels bought by said Billings of said Vanderbeck at the vendue in the spring. Said property to be as good, and in as good condition as when they were sold, except the loss of colt, and that the horses are poor in flesh; said Vanderbeck to deliver to Billings the note given for this property by him, and also a note of $6 held by him against Billings. Vanderbeck to pay Mr. Cook for repairing a drag, which was part of the above property, and Vanderbeck to pay the justice's cost of this suit, to wit: $4.10, being all the costs in the suit. Witness the hands of the parties. JAMES BILLINGS.

May 31st, 1852. ANDREW A. VANDERBECK."

The plaintiff further alleged that in pursuance of the above agreement, on said 31st day of May, 1852, and before 2 o'clock P. M. of that day, the plaintiff took the whole of the property specified in said agreement, and in the condition required by said agreement, to the place where the defendant, on the 19th of March, 1852, held his auction, and at which place the plaintiff purchased the property, and there delivered the same to the defendant, by publicly proclaiming that he had brought the property to that place by agreement with the defendant, to be delivered to him; that he was then ready and willing to deliver the same to the defendant, and then and there the plaintiff offered to deliver to the defendant the said property, according to his agreement, on the 31st day of May, 1852. And then and there the plaintiff publicly demanded and required the defendant to accept and receive said property, which the defendant neglected to do, and absolutely declined doing, by absenting himself from the place of delivery specified in the agreement, for the space of more than three hours next after 2 o'clock P. M. of the 31st day of May, 1852. The plaintiff further alleged that at the time last aforesaid, and during the three hours next after 2 o'clock P. M., and during the whole

of the three hours aforesaid, the plaintiff demanded and required the defendant to deliver to him the aforesaid promissory note of $164.75, dated 19th March, 1852, payable 1st of November, 1852, with interest, undersigned by Seneca Knowlton and Zenas Wright, in pursuance of the agreement, which the defendant wholly declined and neglected to do. And the plaintiff also, at the time and place aforesaid, demanded and required the defendant to deliver to him, the said plaintiff, a note of $6 that the defendant at that time held against the plaintiff, as required by the terms of the agreement herein set out. The plaintiff further alleged that he had kept for the defendant the property aforesaid, from the 31st of May, 1852, up to the commencement of this action, as the bailee of the defendant, at his risk and expense. And that the defendant negotiated and transferred the said promissory note of $164.75, bearing date the 19th day of March, 1852, and payable 1st day of November, 1852, with interest, signed as herein before specified, to some third person before the same matured. That when the said promissory note became due and was payable, the plaintiff was prosecuted thereon, and he paid to the holder of the said promissory note the full amount thereof. The plaintiff demanded judgment against the defendant for the sum of $170.75, the amount of the two promissory notes, principal and interest, above herein set out, and also for the sum of $100 for the keeping and care of the property herein before described, from the 31st day of May, 1852, with costs.

The defendant, by his answer, denied all the allegations in the complaint; and for a further defense and answer, he alleged that he, in pursuance of the agreement between the parties mentioned in the plaintiff's complaint, herein, paid the justice, to wit, $4.10, and paid Wm. Cook for mending the drag, and immediately proceeded, with all reasonable diligence, to the place mentioned by the said contract of the parties, where the defendant's auction sale of March, 1852, was held, and arrived there in due time, according to the provisions of the said contract; that is to say, at 2 o'clock, P. M. of the 31st day of May, 1852, and there found neither the plaintiff nor the property so

agreed by the said contract to be delivered by the plaintiff to the defendant, and then and there waited a reasonable time to receive said property, and to deliver to the plaintiff the promissory notes mentioned in the said contract, and then and there publicly demanded the said property, and was ready and willing in all respects, to duly perform and fulfill, and did duly perform and fulfill his said contract on his part with the plaintiff, but that the plaintiff, to perform his said contract with the defendant, absolutely declined and refused doing, and absented himself entirely from the place where the said property was to be, by the said contract, delivered as aforesaid.

The referee found the following facts: That on the 31st of May, 1852, the plaintiff and defendant entered into the contract set forth in the complaint, and that on the same day the plaintiff had the property therein referred to, at the time and place therein mentioned, ready to be delivered to the defendant; that the defendant was not there ready to receive, and did not receive, the same; and that the plaintiff thereupon took it away, and after a lapse of about one year, and before the commencement of this action, sold the same and applied the proceeds to his own use; that the notes mentioned in the said contract, given to the plaintiff by the defendant, were not transferred by him, but that they were held by him until they were paid voluntarily by the plaintiff, in November, 1852, a short time after they became payable. Upon the facts he found, as matter of law, that the plaintiff was not entitled to recover, and that the defendant was entitled to judgment against him for his costs.

H. R. Selden, for the plaintiff. I. The referee erred in treating the contract in this case as an accord for the satisfaction of a debt. It was a contract *of sale*, so far as the goods were concerned, and as to their title it must be governed by the rules applicable to *executory contracts for the sale of goods*. This was a special agreement embracing divers subjects. On the part of the plaintiff it was a settlement and discontinuance of his suit, and probably released his claim for damages declared for. (12 *John.* 456.) It was a sale of his horses, harness, wagon

and drag, and a binding obligation on his part to transport them to the place, and within the time appointed, and there deliver them to the defendant. On the part of the defendant it was an engagement to pay the costs of the suit, the repairs of the drag, and to deliver up two notes, *not yet due by several months.* How different this is from a *mere accord* for the satisfaction of a debt, is obvious. (*Poth. on Contracts, pt.* 7, *art.* 1, *Bost. ed. by Cushing*, 1839, *p.* 365, §§ 601, 602. *Bouvier's Dic. Accord.* 1 *Bouvier's Inst. p.* 313, § 802. 3 *id. pp.* 44 *to* 46, §§ 2478 *to* 2481.)

II. It is, however, immaterial what *name* the contract bears; it was *valid*, and having been fully performed by the plaintiff, and left unperformed by the defendant, the plaintiff was entitled to recover damages *to some extent*, if he had done nothing to *discharge* his right of action. (2 *John. Cas.* 253.) It cannot be denied that this was a valid agreement. It was *certain*, *mutual*, and on *good consideration.* The plaintiff has done nothing to discharge his right of action. The cases cited by the referee show that whether the agreement be considered as an accord, or as an executory *contract of sale*, not having been executed, *it could not be set up as a bar to a suit on the notes.* Of course the payment of the notes (which might have been enforced by action, notwithstanding the agreement,) could not affect the plaintiff's right of action on the agreement. The only other fact relied upon as a defense is, that prior to the commencement of this suit, the plaintiff sold the property and applied the proceeds to his own use. To this there are two answers: (1.) It is a defense not set up in the answer, and therefore the finding of the fact by the referee is nugatory. (*Harrison* v. *Nixon*, 9 *Peters*, 503. *Garland* v. *Davis*, 4 *How.* 148. *Anon.* 1 *Barb. Ch. R.* 73. *Tripp* v. *Vincent*, 3 *id.* 614. *Peacock* v. *Terry*, 9 *Geo. Rep.* 137. *Knevett* v. *Pool*, *Cro. Eliz.* 463. *Coulter's case*, 5 *Co.* 30, 6. *Bac. Abr. Verdict, W.*) (2.) He had a right to sell the property, and still retain his right of action. (2 *Parsons on Cont.* 483, 484 *and cases there cited. Long on Sales, p.* 448, 9, *Boston ed.* 1839.) The only effect of such sale is to entitle the purchaser

to a credit of the proceeds so far as they may go in payment of the purchase money. As there was no evidence here what the proceeds were, the defendant could only have been entitled *to a nominal* credit on that account, even if he had set it up in his pleadings.

L. Farrar, for the defendant. I. The contract between the plaintiff and defendant, set forth in the complaint, was executory, containing stipulations to be performed by each party, before a right of action could accrue in favor of either against the other. The defendant, at the date of the contract, had two promissory notes against the plaintiff, for the aggregate amount of $170.75, having then several months to run. By the contract the plaintiff agreed to deliver to the defendant the property mentioned therein, at a specified time and place, and the defendant agreed to accept the property at the time and place specified, and deliver the notes to the plaintiff. The substance of the contract was an undertaking on the part of the plaintiff to deliver the property, and a consent on the part of the defendant to accept it, in payment of the notes. If the defendant, by his absence, prevented the plaintiff from executing the contract on his part, the defendant may be liable for a breach of the contract, on his part, and perhaps the plaintiff might in equity be entitled to a specific performance. Yet no change of title, either to the property or notes, took place; and the plaintiff was still liable upon the notes, either in the hands of the defendant or a stranger. (*Russell* v. *Lytle*, 6 *Wend.* 390. *Hawley* v. *Foote*, 19 *id.* 516. *Daniels* v. *Hallenbeck*, *Id.* 408. *Brooklyn Bank* v. *DeGraaw*, 23 *id.* 342. *Tilton* v. *Alcott*, 16 *Barb.* 598.) If the facts were in all respects as alleged in the complaint, the plaintiff would not be entitled to recover in this action; nor would they have constituted a bar to an action by the defendant against the plaintiff on the notes.

II. In the view of the point taken by the plaintiff's counsel, that a readiness to perform on the part of the plaintiff, at the time and place specified in the contract, vested the title to the

property in the defendant, and that the plaintiff thereupon became the defendant's bailee, this action cannot be maintained For if the plaintiff became bailee of the property, the defendant became the plaintiff's bailee of the notes, and the plaintiff could have no action against the defendant for, or on account of the notes, without demand, refusal, &c. unless it appeared that the defendant had transferred them to an innocent holder, whereby the plaintiff had been compelled to pay them. This was, indeed, *alleged* in the complaint, but not proved. The evidence is, that the notes were not transferred by the defendant; that they remained in his hands till they matured, and that they were then voluntarily paid to the defendant by the plaintiff. The further allegation in the complaint, that the plaintiff kept the property for the defendant to the time of the commencement of the action, is also negatived by the evidence. The proof is, and the referee finds, that before the commencement of this action the plaintiff sold the property, without notice to the defendant, and converted the proceeds to his own use. The basis of the action, upon which the plaintiff's right to recover is made to rest, in the complaint, is demolished by the facts established on the trial; and granting the theory of the plaintiff's counsel to be sound, the facts entitle the defendant to judgment.

By the Court, T. R. Strong, J. It is not material to the decision of this case, whether the contract which is the basis of the action, is technically an accord for the satisfaction of a debt or claim, and insufficient for that purpose before its actual execution, or a mere ordinary contract for the sale and purchase of chattels, not belonging to the former class of contracts. In either view it is valid; the mutual stipulations constituting a sufficient consideration; and it not being obnoxious in any other respect to legal objection. An accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for a breach of it. (2 *Parsons on Cont.* 195. *Cartright* v. *Cook*, 3 *Barn. & Adol.* 701. *Story on Cont.* § 982

Com. Dig. Accord, B. 1 *to* 4.) The plaintiff having tendered performance on his part, and the defendant having failed to perform, a cause of action thereby arose in favor of the former, against the latter, for such damages as the plaintiff had by the breach of contract sustained.

The complaint is framed upon the theory that by the tender of performance by the plaintiff the title to the chattels vested in the defendant, and the plaintiff thereafter held the chattels as the defendant's bailee, and that the plaintiff is entitled to recover the amount of the notes and for the keeping and care of the property. It is alleged in the complaint, that the largest note was transferred by the defendant before maturity, and that the plaintiff was sued upon it and paid the same to the holder, but the alleged transfer and suit are disproved. If this theory is sound, the notes were paid by the tender, and the only remedy of the plaintiff in respect to the notes—they remaining in the defendant's hands—was to refuse to pay them again, and when sued upon them to set up the payment as a defense. He could not voluntarily pay the notes to the defendant and then in any mode recover back the amount paid. (*Loomis* v. *Pulver*, 9 *John.* 244. *Egleston* v. *Knickerbacker*, 6 *Barb.* 458. *Sawyer* v. *Tappan*, 14 *N. Hamp. R.* 352. *Mitchell* v. *Sandford*, 11 *Alabama Rep.* 695.) But I am satisfied the theory, upon the facts of the case, is not tenable. It does not appear that the plaintiff, after the tender, assuming that it is a case in which he was entitled by law to elect to treat the property as belonging to the defendant, made such an election; it is not proved that he so declared at the time of the tender, or so notified the defendant subsequently; he retained the property in his possession, for aught that appears, as his own; and before the commencement of this action, without any notice to the defendant, sold the same. (2 *Kent's Com.* 504. *Sands* v *Taylor*, 5 *John.* 396, *and cases there cited.*) The evidence of the sale was proper, although not set up in this answer, upon the question of such an election; particularly as it is alleged in the complaint, and denied in the answer, that the plaintiff had kept the property for the defendant up to the com-

mencement of the action. In case of a note, or similar obligation, payable in specific articles, where nothing is to be done by the creditor but to receive performance, a tender of the articles at the time and place appointed for performance discharges the debt; the property becomes the payee's, and the maker holds the same as his bailee, and at his expense and risk. This rule prevails where the relation of debtor and creditor exists. (2 *Kent's Com.* 508, 9. *Lamb* v. *Lathrop*, 13 *Wend.* 95.) But this doctrine does not, as a general rule, apply to cases of contracts like the present, executory on both sides. (*Shannon* v. *Comstock*, 21 *Wend.* 457. *Thompson* v. *Alger*, 12 *Metcalf*, 428. *Laird* v. *Pine*, 7 *Mees. & Wels.* 474, 478.) *Bement* v. *Smith*, (15 *Wend.* 493,) is materially unlike the present. In that case the plaintiff built a sulky for the defendant, at a price agreed upon, and tendered it to the defendant, who refused to receive and pay for it; the plaintiff then left it with a third person, after notice to the defendant that he would do so, and he was allowed to recover the price of the sulky. That was not a contract for the sale of a chattel, but for work and labor, and the decision, as appears by the opinion of the court, was controlled by reasons peculiar to like cases. The usual consequence of a default to receive and pay for property on an executory contract of sale, is a liability for the actual damages sustained; and the rule of damages is the difference between the contract and the market price of the property at the time for delivery. (*Davis* v. *Shields*, 24 *Wend.* 322. *Sedgwick on Dam.* 260.) I think that is the rule applicable to this case.

The complaint, as already stated, is not drawn with reference to this rule of damages, and it is obvious that the plaintiff at the trial did not seek to recover according to it. No evidence was given of the value of the property; whether it was worth less or more than the amount of the notes, does not appear. At most, therefore, the plaintiff could be allowed only nominal damages. But those I think he was entitled to. (*Sedgwick on Dam.* 47. 1 *Chitty's Pl.* 296, *Phil. ed. of* 1828.) When a defendant answers, the court is not limited, in granting relief, to the relief particularly demanded in the complaint, but may

grant any relief consistent with the case made by the complaint and embraced within the issue. (*Code*, § 275.) The damages implied by law from a breach of the contract are consistent with the complaint and within the issue. Were this an application for a new trial on a case, which is to some extent addressed to the discretion of the court, I should be disposed to refuse it. (*Brantingham* v. *Fay*, 1 *John. Cas.* 256. *Hyatt* v. *Wood*, 3 *John.* 239. *Feeter* v. *Whipple*, 8 *id.* 369. *Cady* v. *Fairchild*, 18 *id.* 129.) But upon appeal, founded on exceptions to the report of the referee, the exceptions must be determined according to the strict legal rights of the parties. (*Herrick* v. *Stover*, 5 *Wend.* 580. *Horton* v. *Hendershot*, 1 *Hill*, 118.)

The judgment must be reversed, and a new trial granted, with costs to abide the event.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith* Justices.]

Campbell and others *vs.* Hoyt and others.

23 555
44 133

A bond of indemnity, given to the sheriff of Monroe county, acknowledged before a commissioner of deeds in the city of New York, cannot be read in evidence at the circuit in Monroe county, without the certificate of the clerk of the county of New York, authenticating the certificate of the commissioner.

It was not the intention of the legislature, by the 9th section of the act of 1833, relative to the proof and acknowledgment of written instruments, to discriminate between conveyances of real estate, and other written instruments, in regard to their authentication by the county clerk, for the purpose of evidence, as previously provided by the revised statutes.

The latter instruments may be proved or acknowledged in the manner provided for the proof or acknowledgment of conveyances of real estate, and the certificate of the proper officer, indorsed thereon, will entitle them to be received in evidence, with the same effect, and in the same manner, as if they were such conveyances.

Such instruments may be received as evidence upon the certificate of proof or acknowledgment, in the same manner as deeds of lands, viz: upon that certificate alone, within the county of the officer, and elsewhere upon that certificate with an additional certificate of the county clerk, authenticating it.

Campbell *v.* Hoyt.

THIS was a motion for a new trial, on a bill of exceptions, taken at the circuit. The judge who tried the cause directed the exceptions to be heard in the first instance at a general term. The action was trespass, for the wrongful taking of a quantity of merchandise, being part of a stock of goods in a store in the city of Rochester. The plaintiffs claimed the goods under and by virtue of an assignment executed by Timothy Chapman, the former owner, to them in trust for the benefit of creditors. The defendants Hoyt, Tillinghast, Knight and Greene, put in an answer jointly, and the defendants Woodworth and Pardee answered separately from the others. The answers denied the allegations of the complaint, and the defendants justified the taking of the goods by virtue of two judgments and two executions; one in favor of Hoyt, Tillinghast, Knight and Greene, and the other in favor of George P. Lord and Samuel N. Brown, against Timothy Chapman, alleging the goods to be those of Timothy Chapman, and that the defendants, Woodworth and Pardee, were sheriff and deputy sheriff of the county of Monroe, and the goods were taken by virtue of such executions against him. The answers also alleged that the assignment, under which the plaintiffs claimed, was fraudulent and void as against the creditors of Chapman. On the trial the plaintiffs proved the execution of the assignment to them, from Chapman, dated August 10, 1853, and the possession of the goods by them, in pursuance thereof. The levy upon the goods by the defendant Pardee, as deputy sheriff, on the 12th of August, 1853, and the removal thereof by him, on the 22d of October, 1853, were also proved. The recovery of the judgments against Chapman, and the issuing of executions thereon, were also proved. The goods were levied upon together, on both executions, and the proceeds of the sales were applied on both. The plaintiffs produced and offered to read in evidence a bond of indemnity to the sheriff, to indemnify and save him harmless, for levying upon and selling the goods in question. This bond was signed and sealed by the defendants Hoyt, Tillinghast, Knight and Greene, and by George B. Lord. And upon it was indorsed the following certificate of acknowledgment:

"*City and county of New York, ss.* On the seventeenth day of October, one thousand eight hundred and fifty-three, before me appeared Edwin Hoyt, Philip Tillinghast, Nehemiah Knight, William B. Greene and George P. Lord, all known to me to be the same persons described in and who executed the within bond, and they severally acknowledged to me that they executed the same. RICHARD WINNE,

Com'r of Deeds."

The counsel for the defendants Hoyt, Tillinghast, Knight and Greene, objected to the bond being read in evidence, as not being sufficiently proved; and to the acknowledgment being read in evidence, because the acknowledgment purported to be taken before a commissioner residing in the city of New York, and not in the county of Monroe, and because there was no certificate of the county clerk of the county of New York, or of any other clerk, that such commissioner was authorized to take the acknowledgment, or any certificate whatever. But the court overruled the objection and permitted the acknowledgment and bond to be read in evidence, and the counsel for the defendants Hoyt, Tillinghast, Knight and Greene, excepted to the decision. The acknowledgment and bond were then read in evidence by the counsel for the plaintiffs. The plaintiffs rested, and the counsel for the defendants Hoyt, Tillinghast, Knight and Greene, moved that they be discharged, on the ground that no case had been made out as against them, but the court refused the motion, and the counsel for these defendants excepted to the decision. The court charged the jury, among other things, that the defendants Hoyt, Tillinghast, Knight and Greene having given the sheriff a bond of indemnity, and the terms of the bond being unlimited, those defendants, by reason of this bond, were liable for the value of all the goods taken by the sheriff, and that they must render a verdict against all the defendants, for all the goods taken by the sheriff. To so much of said charge as held that the defendants Hoyt, Tillinghast, Knight and Greene, were liable for all the goods taken; also, to so much of said charge as held them liable at all; also, to so much as held that the verdict

must be for the full amount against all the defendants, the counsel for the defendants excepted.

The jury found a verdict in favor of the plaintiffs, for the value of the goods.

S. Mathews, for the plaintiffs.

M. S. Newton, for the defendants.

By the Court, T. R. STRONG, J. The bond of indemnity was important evidence in the case, to establish the liability of the defendants who executed it. There was indorsed upon it a certificate, in due form, purporting to be by a commissioner of deeds in the city of New York, of the acknowledgment of the bond by the obligors; and it was offered in evidence under section 9 of chapter 271 of the laws of 1833, (*Laws of that year, p.* 396,) which is in the following words: "Every written instrument, except promissory notes and bills of exchange, and except the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law for taking the proof or acknowledgment of conveyances of real estate; and the certificate of the proper officer indorsed thereon, shall entitle such instrument to be received in evidence on the trial of any action, with the same effect and in the same manner as if such instrument were a conveyance of real estate." The counsel for the defendants who executed the bond, objected to its being received in evidence, for the reason, among others, that there was no certificate of the county clerk of the county of New York, that such commissioner was authorized to take the acknowledgment. By section 18 of chapter 3 of the third part of the revised statutes, relating to "the proof and recording of conveyances of real estate," &c. it is provided that "where any conveyance shall be proved or acknowledged, before any judge of the county courts, not of the degree of counsellor at law in the supreme court, or before any commissioner of deeds appointed for any county or city, it shall not be entitled to be read in evidence, or to be recorded in any other county than that in

which such judge or commissioner shall reside, unless in addition to the preceding requisites there shall be subjoined to the certificate of proof or acknowledgment, signed by such judge or commissioner, a certificate under the hand and official seal of the clerk of the county in which such judge or commissioner resides, specifying that such judge or commissioner was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that the said clerk is well acquainted with the handwriting of such judge or commissioner, and verily believes that the signature to the said certificate of proof or acknowledgment is genuine." (1 *R. S.* 759.) The question is, whether the provision is applicable to the instrument embraced in the section first above recited of the act of 1833, so far as to require the certificate specified in the provision, of the county clerk, in the cases therein provided for, to entitle the instruments to be read in evidence. There does not appear to be any good reason for a discrimination between conveyances of real estate and the other class of written instruments, in regard to their authentication by the county clerk for the purpose of evidence; and I think it obvious from the language of the first mentioned section that none was intended by the legislature. The latter instruments may be proved or acknowledged in the manner provided for the proof or acknowledgment of conveyances of real estate, and the certificate of the proper officer indorsed thereon shall entitle them to be received in evidence, with the same effect, and in the same manner as if they were such conveyances. The certificate mentioned is the certificate of the proof or acknowledgment, but the words, "and in the same manner," were doubtless used for some purpose, and it is not easy to see for what, unless it was to adopt, in regard to the instruments for which that section provides, the provision relating to conveyances of real estate for the authentication of the certificate of proof or acknowledgment, of certain officers, when the conveyances are to be recorded or used as evidence out of the county of the residence of those officers. The instruments may be received as evidence upon the certificate of proof or acknowledgment, in the same manner as deeds of land, that is,

upon that certificate alone within the county of the officer, and elsewhere upon that certificate with an additional certificate of the county clerk authenticating it.

In *Wood* v. *Weiant*, (1 *Comstock*, 77,) it became material to the plaintiff's case to introduce in evidence a deed acknowledged before a commissioner of deeds of another county than that in which the trial was had. The judge rejected the evidence, because there was no certificate of the clerk of the former county, pursuant to section 18 of 1 *R. S.* 759. The plaintiff insisted that the deed might be read under the act of 1833. (*Laws of* 1833, *p.* 396, § 9.) Ruggles, circuit judge, in a written opinion in the case, says, in regard to the 9th section of the act of 1833, "this section was not intended to apply to deeds of real estate; they were already provided for, and when that section provides that the instruments embraced within its scope shall be received in evidence in the same manner as if they were deeds, it recognizes the existing law in relation to deeds as still in force, and puts other instruments on the same footing as deeds, not only with respect to the certificate of acknowledgment or proof, but with respect to the authentication of the certificate by the county clerk." The court of appeals held that the question in regard to the admissibility of the deed in evidence was properly decided by the circuit judge. It is not expressed in words that the court adopted the view taken by the circuit judge in the latter part of his opinion, but I think it a fair inference that they did so. That is directly in point in support of the necessity of a certificate of the county clerk authenticating the certificate of the commissioner, to warrant receiving the bond in evidence, in this case.

It is made a point on the part of the plaintiff, that the production of the bond by one of the defendants, on notice from the plaintiffs, rendered further proof of its execution unnecessary. The bond was produced by the defendant Woodworth, to whom it was given as sheriff, at the request of the plaintiffs' counsel; and further proof of its execution was not necessary as to him; but as to the other defendants, in whose behalf the objection was made, the plaintiffs were not thereby relieved from the ne-

cessity of making full proof of the execution of the bond. Woodworth's admission of the genuineness of the bond, by his production of it, was no more binding on his co-defendants than would be any other admission he might have made in the case.

A new trial must be granted, with costs to abide the event.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

Murfey and others *vs.* Brace and others.

23 561
28 465
8h 698

In an action by a vendor to recover the possession of goods alleged to have been obtained from him by the purchaser, by means of false and fraudulent representations, proof of what the purchaser said, at the time of the purchase, in regard to the reasons for his not trading with another firm, viz. that that firm had refused to trust him without security, is immaterial and irrelevant.

Nor can evidence be given of representations made by the purchaser, to another firm, in respect to his pecuniary circumstances, about the time of his purchase from the plaintiff; where it is not shown, or pretended, that he purchased any goods of that firm on credit, or that he had defrauded or intended to defraud such firm.

Proof that a person about purchasing goods, makes false representations, in respect to his responsibility, to one firm, will not prove, nor tend to prove, that he made similar representations to another firm, of whom he purchases.

Such a case is distinguishable from the cases in which it has been held that, on questions of fraud in the sale or purchase of property, similar transactions of the alleged fraudulent party, with other persons, at about the same time of the transaction in question, may be proved, with a view of showing the *quo animo*.

It is a most salutary rule that the decision of a referee, upon a question of fact—especially of fraud, where there is evidence on both sides, and the point is not entirely free from doubt—cannot be disturbed.

APPEAL by the plaintiffs, from a judgment entered upon the report of a referee. The action was brought to recover the possession of goods sold by the plaintiffs, merchants in New York, to one Thomas Sampson jun. of Macedon, Wayne county; on the ground that the goods were obtained by Sampson, by

means of false and fraudulent representations made by him as to his pecuniary circumstances and responsibility, at the time of making the purchase. The goods were in the possession of the defendants, who claimed to hold the same under and by virtue of an assignment made by Sampson, to them, in trust for the benefit of creditors. On the trial before the referee, Thomas J. Salsman was examined as a witness for the plaintiffs, and testified that in 1853 he was in the employ of the plaintiffs, as their clerk and salesman; that on the 22d of November, Sampson came to the plaintiff's store; witness asked him how trade was; he said he was doing a very good trade; that he had sold his stock down quite low, &c. Witness was asked "Did he say any thing about his having traded in September previous, with Williams, Bradford & Co. of New York?" Answer: "He did." Question. "What did he say?" Objected to as irrelevant and incompetent. The plaintiffs offered to show that Sampson, on the occasion referred to in the question, told witness, in speaking of the houses in the city where he had traded, that he did not intend to buy any more goods of Williams, Bradford & Co. That witness asked him why. That he, in answer, explained the reason to be, that after laying out the goods they had refused to trust him without security, and that then Sampson went on to say that they had no need to distrust him or to be afraid of him, as he was good—and that Sampson, in that connection, made further statements to witness as to his own responsibility. The referee sustained the objection, and overruled the offer, except that he decided that the witness must be confined to what Sampson said as to his circumstances. To this decision and ruling of the referee the plaintiff's counsel excepted. This evidence was again offered, on the re-examination of the witness, and again excluded. Sampson, the purchaser of the goods, was examined as a witness. It had been previously proved that he purchased a bill of goods of Phillips & Spencer in New York, at about the time he purchased of the plaintiffs. The plaintiff's counsel put the following question to him: "Did you make any representations as to your pecuniary circumstances to Phillips & Spencer or

either of them, at their store, 68 Liberty street, New York, on the 15th or 16th of September, 1853?" The defendants' counsel objected to the evidence as immaterial. The referee sustained the objection, and the plaintiff's counsel excepted to the decision and ruling of the referee.

The referee reported that the property in question was the property of the defendants, and not of the plaintiffs, and found the value thereof to be $457.80; for which sum, with interest and costs, the defendants had judgment.

Smith & Cornwell, for the plaintiffs.

O. H. Palmer, for the defendants.

By the Court, T. R. STRONG, J. The decision of the referee upon the objection to the question to the witness Salsman, as to what Sampson, the assignor of the defendants, said to him in regard to trading with Williams, Bradford & Co., was correct. The offer connected with the question, explains what the plaintiffs proposed to prove, and all that was excluded by the decision was, the declaration of Sampson that that firm had refused to trust him without security, and he did not intend to buy any more goods of them. That was wholly immaterial in this case. It would not have tended to prove any representation to the plaintiffs concerning his circumstances, any intention on his part to defraud the plaintiffs, or any fact essential to be established by them. So far as he said any thing about his circumstances, proof of it was allowed by the referee.

There was nothing in the cross-examination of the witness which rendered the evidence excluded proper, when it was again offered on his re-examination.

I think the decision of the referee, excluding the testimony of Sampson, who was called as a witness by the defendants, on his cross-examination, as to representations in respect to his circumstances to Phillips & Spencer at their store, about the time of his last purchase of the plaintiffs, was also correct. The question to the witness on that subject is not limited, and does

not point to any transaction he had with the firm; it was not proved, or proposed to be proved, that he purchased any goods of that firm on credit; on the contrary, it appeared that he paid for the goods he bought of them at the time of the purchase. There is no pretense that he defrauded, or intended to defraud, that firm. Mere naked declarations of Sampson, in regard to his circumstances, unaccompanied by any act of his, alone, were sought to be proved. If proof of such declarations would tend to prove any thing in this case, it must be, that Sampson made similar declarations to the plaintiffs. But it would have no such tendency. It may not have been necessary for him to say any thing as to his circumstances, to effect his purchases of the plaintiffs; if any representations relating to them were made, they may have been of an entirely different character. There would be no safety in concluding from what he said to one firm, that he said the same things to another firm. If such evidence was admissible, on the trial of an indictment for false pretenses in purchasing goods, the pretenses might be proved by showing that on the purchase of goods of another person, about the same time, such pretenses were made.

It is supposed by the counsel for the plaintiffs, that the evidence was admissible on the principle upon which, on questions of fraud in the sale or purchase of property, similar transactions of the alleged fraudulent party with other persons, about the same time of the transaction in question, may be proved. (*Cowen & Hill's Notes*, 452, 3; 465 *and cases cited. Allison* v. *Mathieu*, 3 *John.* 234. *Benham* v. *Cary*, 11 *Wend.* 83. *Cary* v. *Hotailing*, 1 *Hill*, 311.) But there the object is to prove the *quo animo*—the fraudulent intent in the act in question; and other contemporaneous transactions may be pertinent, and materially aid in ascertaining the motive of that which is the subject of inquiry. In *Cary* v. *Hotailing*, Cowen, J., says, "on questions of intent to defraud, other acts similar to the offense charged, done at or about the same time, or when the same motive to offend may reasonably be supposed to have existed as that which is in issue, are admissible with a view to

the *quo animo*." In this case the object of the evidence is to prove specific declarations. The difference between the cases is obvious.

The evidence as to the representations made by Sampson, under which the goods were purchased, is conflicting; it presented a fair question for the decision of the referee; and it is a most salutary rule, that the decision of a referee upon a question of fact, especially of fraud, where there is evidence on both sides, and the point is not entirely free from doubt, cannot be disturbed.

This disposes of all the questions raised on the argument, and the judgment must be affirmed.

[MONROE GENERAL TERM, March 2, 1857. *T. R. Strong, Welles* and *Smith*, Justices.]

CHARLES BROWN, adm'r &c. *vs.* CHRISTINA BROWN.

Where a husband deposited in a savings bank, money belonging to himself, to his own credit, saying he wanted it so that either he or his wife could draw the money, and both he and his wife entered their names on the signature book, opposite which the clerk of the bank wrote the words, "to be drawn by either," and a pass book was given to the husband, as a voucher for the deposit; *Held*, 1. That this was not a valid gift of the money to the wife; a delivery of the money, or at least of the evidence of the deposit, being indispensable to such a gift.

2. That upon the wife's surviving her husband, she was not entitled to the money on the ground of the deposit having been to the joint credit of both.

3. That the wife was not, in respect to the deposit, a creditor of the bank, but the husband was the sole creditor.

4. That the wife was a mere agent of the husband, in respect to the sum deposited, without any beneficial interest therein; and that so long as the authority to her was unrevoked she could draw the money, but that her authority terminated on the death of her husband.

And the wife having, after the death of her husband, presented the pass book at the bank and drawn out the money, giving a receipt therefor, signed by her in behalf of her husband, it was *further held* that she was bound to refund the money, in an action at the suit of her husband's administrator.

Brown *v.* Brown.

ON the 20th day of October, 1852, Charles Brown, jr. went with his wife to the Rochester Savings Bank, where he deposited $500, saying "he wanted it so that either he or his wife could draw the money." Both entered their names on the signature book, opposite which the clerk of the bank wrote the words "to be drawn by either." The account was opened with Mr. Brown, and a pass book was given as a voucher for the deposit, which book he took away with him. Mr. Brown died in the afternoon of the 5th of January, 1853, and on the following day Mrs. Brown, the defendant, drew the money; giving therefor the following receipt:

"Rochester, Jan. 6, 1853

Received of Rochester Savings Bank, on my deposit, five hundred and four $\frac{17}{100}$ dollars. For CHARLES BROWN.

CHRISTINA BROWN."

When the money was thus drawn the officers of the bank did not know of the death of Mr. Brown. On the 23d of March, 1853, the plaintiff was appointed administrator, &c. of his son, the said Charles Brown jun. deceased. After demand and refusal, this action was brought to recover the money. On the trial, conversations with the deceased were testified to, in which he stated, after the money was deposited, that he had "put the money in the bank, and he took his wife along, and the money he put in the bank belonged to her; that he had sold his house and lot, so that nobody could have any thing of it, except his wife;" that he had "fixed it so that his folks could not take it again, if he should die; that she (his wife) had made the most of it by sewing and washing and keeping boarders; that he had put her name in the bank book, so that she could take it at any time," &c. The money deposited was money which Charles Brown, jun. had received on the sale of his house and lot and furniture. It was proved that he owed some debts, at the time of his death. The plaintiff was one of his creditors.

The evidence being closed, the court charged the jury, that from the evidence of the witness Loomis, it was probable that the deceased, coming to the bank as he did, intended to deposit the money for the benefit of the defendant; that to the

mind of the court the circumstances of the deposit were very strong evidence that he intended to give the money to her; but that whatever might have been his intentions, if he did not make what the law would pronounce a delivery of the property, the title to the money did not pass; that so long as the deceased kept a control over the money, or retained the power to re-possess himself of it, he was still the owner of it; it mattered not that the wife earned a portion or all of the money by her labor and services; the law adjudged the money so earned to belong to the husband. That evidence of her services was admitted to show a good reason why there should have been a gift; that whether there was a gift or not was a fact which must be made out in a legal way; if there was a gift at all, it was a gift *inter vivos*, and better for the defendant than a gift *causa mortis*. The plaintiff's counsel requested the court to charge the jury that had the money been deposited in the name of the wife alone, it was competent for the deceased, at any time, to revoke her authority to draw it, and that her authority to draw the money in this case ceased with the death of her husband. The court refused so to charge, to which refusal the plaintiff's counsel excepted. The plaintiff's counsel then requested the court to charge the jury that if they believed the witness Loomis as to the entries in the signature book and the pass book, they must find for the plaintiff. The court refused so to charge, to which refusal the plaintiff's counsel excepted. The plaintiff's counsel then requested the court to charge the jury that if they believed the deceased left debts they must find for the plaintiff. The court refused so to charge, but held that the fact of there being debts made no difference, unless it was shown that there was not enough of the estate left to pay the debts, and as to this fact the *onus probandi* was on the plaintiff; to which refusal and ruling the plaintiff's counsel also excepted. The defendant's counsel then requested the court to put the question of intent to the jury; that if the jury believed that the deceased intended to give the money to his wife when he made the deposit, they

should find for the defendant. The court refused so to charge, to which refusal the defendant's counsel excepted.

The jury then, under the direction of the court, excepted to by the defendant, rendered a verdict for the plaintiff for the sum of $586.22, subject to the opinion of the court at general term, on a case to be made by the plaintiff, with leave to turn the same into a bill of exceptions.

F. Delano, for the plaintiff.

P. G. Buchan, for the defendant.

By the Court, T. R. STRONG, J. The money in question, before it was deposited in the bank, belonged to the plaintiff's intestate, the husband of the defendant. It was the proceeds of a sale by him of his house and lot, and some of his furniture, in which it does not appear that the defendant had any legal interest. Her labor had contributed to the acquisition of the property, and in a greater degree than that of the intestate, according to his declaration to one of the witnesses; but he, as her husband, was entitled to her services and earnings, and the property belonged to him. There is evidence in the case, on the part of the defendant, that the intestate, in conversation about the sale of his property, and the money, stated that he had put the money in the bank, and it belonged to the defendant; but there is also evidence by the defendant, of declarations of the intestate that he had fixed it so his folks could not take the money if he should die; that his wife had put her name in the bank book, so she could take it at any time; that he had put it in the bank in his and his wife's name. Viewing all the evidence on this subject, it is apparent the intestate did not mean to be understood that the money actually was the defendant's, but only intended to convey the idea that he had, as he supposed, placed the money in the bank on such terms that the defendant, and not his father, or any of his father's family, could obtain it if she survived him. It is manifest that in making the deposit the intestate did not in-

tend to give the money to the defendant; for although he first stated to the officers of the bank that he wanted to deposit it in the name of his wife, it is evident from the conversation which followed, and what was done, that he supposed he would not thereby divest himself of a right to take the money from the bank, and that he desired the deposit to be so made that either he or the defendant could withdraw the money. Clearly there was no valid gift. A delivery of the money, or at least of the evidence of the deposit, investing her with the full control over it, was indispensable to such a gift. And there is no pretence, or ground for a claim, that the intestate subsequently made a gift of the money to the defendant. If then the defendant is entitled to retain the money, it must be because the deposit was in effect to the joint credit of the intestate and herself, and that she is the surviving creditor. The intestate, although the sole owner of the money, might, except as against the claim of his creditors in the absence of other assets to pay them, by depositing the money to the credit of himself and the defendant jointly, secure to her the whole on her surviving him. He clearly desired that in that event she should have the whole; but that is not sufficient to entitle her to it unless the legal means to effect the object were pursued. Like an intention to make a gift, unexecuted by a delivery, it is fruitless. The only evidence in regard to the transaction with the bank, in the deposit of the money, aside from the declarations of the intestate already referred to, is derived from the book keeper of the bank, and the pass book taken from the intestate. He testified, in substance, that on the intestate saying he had some money which he wished to deposit in the name of his wife, who was present, the witness inquired whether either had an account with the bank, and was told that the intestate had; that he turned to the account and told him it did not make any difference whether the money was in her name or his; that it could be so put in that either could draw it. It was then credited to the name of the intestate, posted under his old account, a pass book charging the bank and crediting him with the money was delivered to him, and he and the defendant entered their names in the signature

book of the bank, opposite which the clerk of the bank wrote the words "to be drawn by either." It does not appear that the intestate expressed in words, his assent to have the deposit to the credit of his own name solely, but such assent sufficiently appears from what was done, in the absence of any objection by him. The book keeper further testified: "the pass book is held by the depositor as a voucher, and the only voucher, until the whole amount is drawn from the bank, and then it is given up to the bank." Taking this testimony of the book keeper, in connection with the declarations of the intestate, and regarding the claim of the defendant as favorably as I am permitted to do, it appears to me the court cannot properly hold that the defendant was, in respect to the deposit, a creditor of the bank. The intestate was the sole creditor. He deposited his own money to his individual credit. His name only appeared in the books of the bank as the creditor. The entry of the names in the signature book, with the words added by the clerk, formed no part of the contract of deposit. The object of that was, that the bank might have evidence of their handwriting, and to show that the defendant was authorized to receive the money. The appropriate mode of withdrawing the money would be, by presenting the pass book and giving a receipt for the money in the name of the intestate. This mode was pursued when the money was obtained by the defendant; she delivered the pass book, and gave a receipt expressing by the signatures to be for the intestate by the defendant.

The difficulty with the defense is, that the intestate misjudged as to what was necessary to be done to secure this money to the defendant if she outlived him. He may have been misled by the advice of the book keeper; but it was intended by him after the advice, that the business should be done as it was done. The business was done in such a manner that the defendant, as well as the intestate, so long as the authority to her was unrevoked, could get the money; but her authority terminated with the death of the intestate. She was a mere agent in the matter, without any beneficial interest. It is not in the power of the court to relieve the defendant, and give her

the money, because the intestate intended she should have it. It can only pronounce the law upon the actual transaction between the intestate and the bank, leaving the case to swell the number of those with which the books abound, where parties have failed by their acts to carry out their intentions.

The cases of *Stanwood* v. *Stanwood*, (17 *Mass. Rep.* 57,) *Phelps* v. *Phelps*, (20 *Pick.* 556,) *Ames* v. *New*, (5 *Metc.* 320,) and *Fish* v. *Cushman*, (6 *Cushing*, 20,) throw some light on this case, but are all clearly distinguishable from it.

In my opinion the plaintiff is entitled to judgment on the verdict.

[Munroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

Arms and Toan, adm'rs &c., *vs.* Middleton and others.

Where it was proved that a physician attended the birth of a person whose age was the subject of inquiry in the action; that he was in practice from a period many years prior to the birth to several years afterwards; that he kept a register of all his cases of births; and that in this register was an entry of the birth of such person, at a time specified; and subsequent entries of the birth of a brother and sister; *Held* that the entries were competent evidence, after the death of the physician making them.

Such a case comes within the rule that entries made by a third person, in the usual course of professional employment, or of a clerkship or agency, are, after the death of the person making them, competent evidence, as being part of the *res gestæ*.

It is not necessary that there should be an absolute duty, on doing an act, to make an entry of it, to render the entry admissible after the death of the person making it. It is sufficient that it is a proper case for making an entry of the act, and that such is the usual practice of the individual.

APPEAL from an order made at a special term. The action was commenced in May. 1850, to revive a decree which the complaint alleged was directed, by the late court of chancery, to be drawn, and entered, but which was never in fact entered. The following issues were directed to be tried by a jury: 1. Was Isaac L. Middleton born on the 3d day of May, 1810? 2. Was

Isaac L. Middleton born on the 3d day of May, 1815? 3. Was Isaac L. Middleton, the defendant, 21 years of age on the 3d day of December, 1835, when his guardian *ad litem* put in his answer for him, in the chancery suit, as alleged? By direction of the court, Isaac L. Middleton held the affirmative of the issues. The issues were tried at the Seneca county circuit in September, 1854, before Justice WELLES. Mrs. Taylor, the mother of said Isaac L. Middleton, and Sally C. Brown, half sister of said defendant, testified that he was born on the 3d day of May, 1810. Several other witnesses testified in behalf of the defendant. The plaintiff called Richard T. King as a witness, who swore that he was a son of Dr. Consider King, the physician who attended Mrs. Middleton at the time Isaac was born, and that his father died some three years before the trial; and produced a book, which he testified was in his father's handwriting, and kept by him as a register or list of the births he attended, from the year 1805 to 1846. The plaintiff offered the book in evidence for the purpose of showing that the defendant was born on the 3d day of May, 1815. The defendant's counsel objected to the evidence, on the grounds, 1st, That the entries proposed to be read were the mere declarations of Dr. King, and not admissible in this case. 2d. That the birth of the defendant could not be shown by such evidence when there were living witnesses by whom the plaintiffs could prove the fact, and who were within their reach. 3d. That such proof was not admissible when the mother and other persons who knew the fact were present. 4th. That no proper foundation had been laid; and 5th. That the entries in the book showed they could not have been made by Dr. King, at the time when the services were rendered. The court overruled the objections, and held that the evidence was admissible; to which the defendant's counsel excepted, and the book was read in evidence, wherein was an entry showing that Isaac Middleton, the father of the defendant, had a child born on the 3d day of May, 1815, with the word "Nigri" added. (The defendant and his father were both of African descent.) Subsequent entries were found, and read from the book, which related to some of the other children,

one male and one female. The principal question in the case was whether the memorandum book or register of births made by Dr. King was properly received as evidence. The jury found that Isaac Middleton was not born on the 3d day of May, 1810, but was born on the 3d day of May, 1815. Also, that Isaac Middleton was not twenty-one years of age on the 3d day of December, A. D. 1835, when his answer was put in for him by his guardian *ad litem* in the alleged chancery suit. A verdict was therefore rendered in favor of the plaintiff. A motion was made at the Cayuga special term in January, 1856, before Justice WELLES, to set aside the verdict, and for a new trial; which motion was denied, and Isaac L. Middleton, the only defendant who had answered in the cause, appealed.

E. W. Arms, for the plaintiffs.

John E. Seeley, for the appellant.

By the Court, T. R. STRONG, J. This case comes within the rule, that entries made by a third person in the usual course of professional employment, or of a clerkship, or agency, are, after the death of the persons making them, competent evidence as being part of the *res gestæ*. The cases in support and illustrative of this rule, are very numerous. Many of them will be found collected in 1 *Greenl. Ev.* §§ 115, 116, 117; 1 *Smith's Lead. Cases*, (*Price* v. *The Earl of Torrington, and notes, commencing at p.* 139.) Among the cases of this kind in this state, are *Merrill* v. *The Ithaca and Owego R. R. Co.* 16 *Wend.* 586;) *Sheldon* v. *Benham*, (4 *Hill*, 129;) *Brewster* v. *Doane*, (2 *id.* 537.) In the case last cited, Bronson, J., who delivered the opinion of the court, says: "The rule is that entries and memoranda made in the usual course of business, by notaries, clerks and other persons, may be received in evidence after the death of the person who made them." It is not necessary, as appears by several of the cases, that there should be an absolute duty, on doing an act, to make an entry of it, to render the entry admissible

after the death of the person making it; it is sufficient that it is a proper case for making an entry of the act, and that such is his usual practice. The case of *The Inhabitants of Augusta* v *The Inhabitants of Windsor*, 19 *Maine R.* (1 *Appleton*) 317, is very much like the present one. That was an action for charges incurred on account of a pauper, and upon the trial it became material to ascertain the time when one Linscott had a leg broken; after proof that a certain physician in regular practice in 1820 and 1821, attended and set the leg, and that he died in 1839, a day book of the physician, in his handwriting, containing two charges against Linscott, one dated September 28, and the other September 29, 1821, for reducing a fracture in his leg, and for medical attendance, were held to be admissible evidence. In the present case it was proved the physician attended the birth of Isaac L. Middleton, whose age was the subject of inquiry; that he was in practice from a period many years prior to the birth to many years afterwards; that he kept a register of all his cases of births, the aggregate number of which, in about 40 years, was 990; and that upon this register were entries of the birth of Middleton, and subsequently of a brother and a sister, which are the entries in question. I am satisfied the entries were properly received.

It is made a point, that numerous births, embracing a period of several months, appeared by the book to have been entered at one time, and that in many instances the entries did not succeed each other in the order of time; but the case does not contain a copy of the book, or such a description of it that the court can see this is so; hence the point cannot be regarded.

The order appealed from, denying a new trial, must be affirmed with costs.

[Monroe General Term, March 2, 1857. *T. R. Strong, Welles* and *Smith*, Justices.]

HATCH *vs.* PEET and others.

In averring performance of a condition precedent to a right of action upon a bond, it is not sufficient for a complaint to allege that the parties who were to do so, "did execute a release of all actions," &c. without stating whether it was by an instrument under seal, or in what manner, so as to enable the court to judge whether it was a valid release.

So, also, an allegation as to the discontinuance of suits, that all suits, &c. "were discontinued, each party paying his own costs, as in the condition of said bond stipulated," without stating what was done for the purpose of a discontinuance, so that the court may see that the object was effected, is insufficient.

The rules respecting the mode of setting forth the performance of conditions precedent were not intended to be substantially changed by the code.

Facts showing performance, are to be stated; not circumstances which are mere evidence; nor legal conclusions.

Where one of the conditions precedent in a bond was that "all suits in the supreme court, and in the county court of Monroe county, are to be discontinued, each party paying his own costs; meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court, one against *Norman Peet*, one against Nelson Peet, and one against Silas Dunham and others; and five suits in the county court, three in the name of Polly M. Hatch, and two in the name of Elmore A. Hatch," and the allegation of performance, in the complaint, was that "all suits in the supreme court, and in the county court of Monroe county, were discontinued, each party paying his own costs, as in the condition of said bond stipulated, meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court, against Nelson Peet, and one against Silas Dunham and others; and five suits in the county court, three in the name of Polly M. Hatch, and two in the name of Elmore A. Hatch;" nothing being said in the latter allegation, about the suit against *Norman Peet*, mentioned in the bond, and it not appearing in any way to have been discontinued; *it was held*, on demurrer, that the complaint was bad for not showing performance of the stipulation as to that suit; the general averment that all suits, &c. were discontinued, being expressly limited, by what followed, to the suits particularly specified.

Held also, that the latter clause of the sentence explained and restricted the former part; and that although unnecessary, yet having been made, and the general allegation qualified by it, it could not be rejected as surplusage.

APPEAL from an order made at a special term, overruling a demurrer to the complaint. The complaint alleged that on the 7th day of January, 1853, the defendants and Nelson Peet, deceased, executed and delivered to Polly M. Hatch and Elmore A. Hatch, a bond, of which the following is a copy: "Know all men by these presents, that we, Nelson Peet, Harmon H. Peet,

Silas C. Peet, Norman C. Peet and Silas Dunham are held and firmly bound unto Polly M. Hatch and Elmore A. Hatch, in the penal sum of two thousand dollars, to be paid to the said Polly M. and Elmore A., for the which payment well and truly to be made we bind ourselves and personal representatives, jointly and severally, firmly by these presents. Sealed with our seals. Dated January 7, 1853. The condition of this obligation is such, that if the said obligors or personal representatives shall well and truly pay or cause to be paid to the said obligees, their personal representatives or assigns, the just and full sum of one thousand dollars when and upon the performance of the following covenants and stipulations by the said obligees, that is to say: 1st. Polly M. Hatch, Daniel Hatch and Elmore A. Hatch, of Webster, are to convey by a good and sufficient deed of quit-claim, duly acknowledged, and have the same recorded in the clerk's office of Monroe county, at their expense, cost and charges, all their and each of their interest, right, title and claim of in and to the farm, being about 88 acres of land in Webster, of which the late Hannah Beecher died in possession, and which the said Polly, Daniel and Elmore A. claim an interest in as heirs at law of said Hannah Beecher, to Benjamin S. Whitehead. 2d. The said obligees are to procure at their own cost and charges and have recorded in said clerk's office, a conveyance in like manner and to like effect from Charles E. B. Hatch, Henry A. Hatch and Mary Ann Everitt to said Benjamin S. Whitehead, of their respective rights, title, &c., to said firm. 3d. The said Polly M. Hatch and Elmore A. Hatch are to assign to Nelson Peet for himself and for the benefit of the said obligors, and others in interest, the demands, notes and claims which they hold against the said Hannah Beecher's estate, and which are now in suit in the supreme court, (P. G. Buchan, plaintiff's attorney in the suit.) 4th. The said obligees are to cause judgments to be perfected in the said suits for these claims at their, the said obligees, expense and costs, and to cause an assignment of said judgments to be made to the said Nelson Peet for his benefit and for the benefit of others interested in the said farm. It being expressly understood

that when said conveyances are recorded there shall appear no other conveyance or conveyances from said Hatches, or any of them to said farm, or any share thereof, recorded in said clerk's office. It also being understood that the demands in said suits shall be shown by the oath of the said Daniel Hatch and other witnesses, to be genuine and subsisting demands unsettled or paid at the coming circuit in Monroe. 5th. The said Polly M., Elmore A. and Daniel are to execute a release in full of all actions and causes of action whatever to said Nelson Peet, Norman Peet, Lorenzo A. Dunham, Stephen B. Peet, Harmon H. Peet, Silas Dunham and Silas C. Peet, for any supposed trespasses on said farm or otherwise, or to their or each of their persons, meaning the persons of said obligees, in any way or at any time, and also for any use, rents or profits of said farm, since the death of said Hannah Beecher, by whomsoever enjoyed, directly or indirectly, in which release there shall be a provision against any suit or suits by the said Polly, Elmore or Daniel to be hereafter brought for any cause hitherto against any of said releasees, under stipulated damages of $200 for so doing. The said obligees will execute a release of all actions and causes of action to said Elmore A., Daniel and Polly M. when requested, under same penalty. 6th. All suits in the supreme court and in the county court of Monroe county are to be discontinued, each party paying his own costs, meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court; one against Norman Peet, one against Nelson Peet and one against Silas Dunham and others, and five suits in the county court—three in the name of Polly M. Hatch and two in the name of Elmore A. Hatch. 7th. In case the conveyances of Charles E. B. Hatch, Henry A. Hatch and Mary Ann Everitt cannot be obtained as stated in stipulation two aforesaid, by reason of their refusal or otherwise, then said Polly M., Elmore A. and Daniel are to covenant to and with said Benjamin S. Whitehead to indemnify against their claim to said farm, and costs and charges in defending said claim, same to be in due form. It is also hereby agreed on the part of the obligees, when said moneys shall become payable to said obligees by above stipu

lations performed, said Nelson Peet shall also deliver to said obligees a note in his possession, dated 19th January, 1852, signed by Charles Close, for $200, payable 1st of October, 1853, with use, to Polly Hatch or bearer; and said Peet shall guarantee on said note that no part has been paid to him by the maker or on his behalf.

NELSON PEET. [L. S.]
HARMON H. PEET. [L. S.]
SILAS C. PEET. [L. S.]
NORMAN C. PEET. [L. S.]
SILAS DUNHAM." [L. S.]

The plaintiff alleged: That in pursuance of the stipulations and covenants in said bond on their part, to be performed, the said Polly M. Hatch and Elmore A. Hatch and Daniel Hatch did convey, by a good and sufficient deed of quitclaim, duly acknowledged, and had the same recorded in the clerk's office of Monroe county, at their expense, costs and charges, all their and each of their interest, right, title and claim, of, in and to the farm, being about 88 acres of land in Webster, of which the late Hannah Beecher died in possession, and in which the said Polly, Daniel and Elmore A. claimed an interest as heirs at law of said Hannah Beecher to said Benjamin S. Whitehead. That the said Polly and Elmore A. did procure at their own cost and charges, and had recorded in said clerk's office, a conveyance in like manner and to like effect from Charles E. B. Hatch, Mary Ann Everitt and Henry A. Hatch, by his then name of Henry S. Hatch, to said Benjamin S. Whitehead, their respective rights, title, &c. to said farm. That the said Polly and Elmore A. did assign to said Nelson Peet, for himself and for the benefit of the obligors and others in interest, the demands, notes and claims which they held against the said Hannah Beecher's estate, and which were then in suit in the supreme court. That the said Polly M. and Elmore A. caused judgment to be perfected in said suits for those claims at their expense and costs, and caused an assignment of said judgments, according to the tenor, effect and conditions in said bond set forth, to be made to the said Nelson Peet, for his benefit and for the benefit of

others interested in the said farm. That when said conveyances were recorded there appeared no other conveyance or conveyances from said Hatches, or any of them to said farm or any share thereof, recorded in said clerk's office. That the demands in said suits were proven on the oath of said Daniel Hatch and other witnesses to be genuine and subsisting demands unsettled and not paid. That the same were not so proved at the circuit court in Monroe county, immediately subsequent to the execution of said bond, by reason that said court was unable from want of time to try said causes, without delay or default on the part of said Daniel M. and Elmore A., but were proved at the circuit court immediately succeeding, in said county. That the said Polly M., Elmore A. and Daniel did execute a release in full of all actions and causes of action whatever, to said Nelson Peet, Norman Peet, Lorenzo A. Dunham, Stephen B. Peet, Harmon H. Peet, Silas Dunham and Silas C. Peet, for any supposed trespasses on said farm or otherwise, or to their or each of their persons, meaning the persons of said Polly M. and Elmore A. in any way or at any time, and also for any use, rents or profits of said farm, since the death of said Hannah Beecher, by whomsoever enjoyed, directly or indirectly, in which release there was a provision against any suit or suits by the said Elmore, Polly or Daniel to be brought after date of said bond for any cause whatever against said releasees under stipulated damages of $200 on so doing. That all suits in the supreme court and in the county court of Monroe county were discontinued, each party paying his own costs as in the condition of said bond stipulated, meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court, against Nelson Peet, and one against Silas Dunham and others, and five suits in the county court, three in the name of Polly M. Hatch, and two in the name of Elmore A. Hatch. That said defendants and the said Nelson Peet, or either of them, have not paid said sum of $1000, nor has the said Nelson Peet delivered to said plaintiff the note made by Charles Close for $200, described in said bond, nor guaranteed that no part has been paid to him by the maker thereof or on his behalf, as in

said bond provided. The plaintiff further averred, that on or about the 14th day of April, 1855, the said Elmore A. Hatch and Polly M. Hatch, by an instrument in writing, under seal, duly executed by them, for value received of said plaintiff, assigned, transferred and made over to him, the said plaintiff, the said bond and all their right, title and interest therein; wherefore the plaintiff prayed judgment for $1200, with interest, &c.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The special term overruled the demurrer, with leave to the defendants to answer on the usual terms. The defendants appealed.

M. S. Newton, for the plaintiff.

H. K. Jerome, for the defendants.

By the Court, T. R. STRONG, J. The performance of the several acts specified in the condition of the bond to be performed, by the persons therein named, was a condition precedent to a right of action on the bond, against the defendants; and consequently essential to be stated in the complaint to disclose a cause of action. By section 162 of the code, a simple and easy mode of stating performance in such cases is furnished; it being declared by the section, that "in pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance." That provision was either overlooked by the plaintiff's attorney, or he did not desire the aid of it, in framing the complaint in this case, as the complaint does not contain such a statement or allegation, and hence the sufficiency of the complaint, on demurrer, must be

determined independent of it. The allegations of performance state the doing of the acts to be done, in the precise language of the condition of the bond, and some of them, as for instance, that in relation to the execution of a release of actions, and that relating to a discontinuance of suits, involve matter of law to such extent that, according to the rules of pleading in such cases before the code, they would be bad on special demurrer. It is alleged that the parties who were to do so, "did execute a release of all actions," &c. without stating whether by an instrument under seal, or in what manner, so as to enable the court to judge whether it is a valid release. Chitty says, (1 *Chit. Pl.* 283, *ed. of* 1828,) "performance ought to be shown with such certainty that the court may judge whether the intent of the covenant has been duly fulfilled, as in consideration that the plaintiff would acquit A. of a debt, it is not sufficient to say that he acquitted him, without showing how, as by deed," referring to *Leneret* v. *Rivet*, (*Cro. Jac.* 503;) *Com. Dig. tit. Pleader C*, 60; *Cro. Eliz.* 914; *Sir T. Jones*, 125. The doctrine stated by Chitty is fully supported by those authorities. The allegation as to the discontinuance of suits is, that all suits, &c. "were discontinued, each party paying his own costs, as in the condition of said bond stipulated," not stating what was done for the purpose of a discontinuance, so that the court may see the object was effected. The entry of an order of discontinuance with the clerk was necessary. (*Averill* v. *Patterson*, 10 *How. Pr. R.* 85.) That the allegations of performance particularly specified, at least, are bad on special demurrer under the former rules of pleading, I also refer to *Thomas* v. *Van Ness*, (4 *Wend.* 549;) *Glover* v. *Tuck*, (24 *id.* 153.) Those rules, respecting the mode of setting forth the performance of conditions precedent, were not, I think, intended to be substantially changed by the code. There is nothing in the sections as to the contents of a complaint, or of an answer, inconsistent with them; on the contrary, these sections substantially adopt them, by prescribing for a complaint a plain and concise statement of the facts constituting a cause of action, and that new matter in an answer be stated in ordinary and concise language

The whole spirit and policy of the code accord with those rules, which are highly salutary, and indispensable to a wise and just system of pleading. Facts showing performance are to be stated, not circumstances which are mere evidence, nor mere legal conclusions. But whether the remedy under the code for a defective allegation of performance—not an omission of the allegation—by being too general or too circumstantial, is only by motion under section 160 of the code to strike out for redundancy, or that the pleading be made definite and certain by amendment, or sometimes by demurrer, and when a demurrer will lie for such a defect, if at all, are questions not perhaps free from difficulty. In *Richards* v. *Edick*, (17 *Barb.* 260,) Gridley, J., says, "defects merely formal, and which under the former practice were appropriate subjects of a special demurrer, cannot now be reached and corrected by this form of proceeding;" and again, "the counts of the complaint to be overthrown by the demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever." (*See Swift* v. *Dewitt*, 3 *How. Pr. Rep.* 280; *Smith* v. *Brown*, 17 *Barb.* 431; *Van Schaick* v. *Winne*, 16 *id.* 90; *Smith* v. *Lockwood*, 13 *id.* 209; *The People* v. *Ryder*, 2 *Kernan*, 433; *Hall* v. *Taylor*, 8 *How. Pr. Rep.* 428.) Where there is too great minuteness and detail, and in some cases where facts and law are blended, probably the remedy is to be sought under section 160 of the code; when the allegation is of a mere legal conclusion, the remedy may perhaps be by demurrer. An answer that a plaintiff is not the legal owner and holder of a note sued upon, is insufficient to warrant evidence under it, and is of course bad on demurrer, as stating a mere legal conclusion. (*See Seeley* v. *Engell*, 17 *Barb.* 530; *Thomas* v. *Desmond*, 12 *How. Pr. Rep.* 321; *Brown* v. *Ryckman*, *id.* 313.) So also, for the same reason, it was held by the supreme court, in *Seeley* v. *Engell*, that an answer that a note was given by mistake for a greater sum than was due, &c. to wit, a sum sufficient to cancel the balance claimed to be due on the note, &c. was insufficient to admit evidence

under it; but this latter ruling has very properly been reversed by the court of appeals. The defect, if any, was not a statement of a legal conclusion, but a too general statement of a fact, and the remedy was by motion under section 160 of the code. The principle of these cases is applicable to like defects in a complaint. An allegation of a legal conclusion merely, is one which gives no fact, but matter of law only. It is not easy always, in practice, however, to determine what allegations are of that character, on account of the difficulty in deciding when facts will be held to be implied from, and therefore embraced in, an allegation in pleading. The allegation in this case, that suits "were discontinued," would seem to be as naked of facts as the allegation of ownership of a note, or demand, in the cases cited.

But it is not necessary, in the view which I take of this case, to decide whether the complaint is demurrable on account of any such defects as have been suggested, as I think the complaint is bad, for not showing, in any manner, performance of one of the stipulations forming a condition precedent, in the bond. That stipulation is, that "all suits in the supreme court, and in the county court of Monroe county, are to be discontinued, each party paying his own costs—meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court; one against Norman Peet, one against Nelson Peet, and one against Silas Dunham and others; and five suits in the county court, three in the name of Polly M. Hatch, and two in the name of Elmore A. Hatch." The allegation of performance is, that "all suits in the supreme court, and in the county court of Monroe county, were discontinued, each party paying his own costs, as in the condition of said bond stipulated, meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court, against Nelson Peet, and one against Silas Dunham and others; and five suits in the county court, three in the name of Polly M. Hatch, and two in the name of Elmore A. Hatch." Nothing is said in this latter allegation about the suit against Norman Peet, mentioned in the stipulation, and it does not appear in any way to have been discontinued. The

general averment that all suits, &c. were discontinued, is expressly limited, by what follows, to the suits particularly specified, in which the suit against Norman Peet is not included. The latter clause of the sentence explains and restricts the former part. Probably the explanation was unnecessary, but having been made, and the general allegation being qualified by it, it cannot be treated and rejected as surplusage.

Other questions raised on the demurrer need not be examined.

I think that for the defect in the complaint last above specified, the complaint does not show a cause of action, and that the order appealed from should be reversed with costs. and the demurrer sustained, with leave to the plaintiff to amend, on payment of costs.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith* Justices.]

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29a 408

Chappell *vs.* Spencer and others.

Where the payee of a note, before its maturity, transferred it to another, and for the purpose of giving his own personal security to the purchaser, upon the note, and without any fraudulent intent, wrote his own name under the names of the makers, adding thereto the word "security;" *Held* that this was a material *alteration*, which vitiated the instrument.

APPEAL from a judgment entered at a special term. The action was brought against the defendants Robert Howie, Wellington Spencer and John Spencer, as the makers of a promissory note. The complaint described the note as having been made by the defendants and one William A. Murray. The answer was a general denial. The cause was referred to a referee, who found the following facts: That about the middle of the month of July, 1854, the defendants made a joint and several promissory note for $215, payable with interest on the 1st day of November, then next, to William A. Murray, or bearer, and delivered the same to said Murray in the due course of bus-

iness; that when the said note was so delivered it was signed by the defendants in the following order and manner.

"WELLINGTON SPENCER.
JOHN SPENCER, surety.
ROBERT HOWIE."

That afterward, and before the said note became due, Murray, in due course of business, transferred said note to one R. J. Hodges, and upon such transfer, and without any fraudulent intent, but for the purpose of adding his own personal security to said note, and in pursuance of an agreement to that effect, made between him and Hodges, Murray signed his own name to the note, under the names of the defendants, adding to it the word "surety." Hodges afterwards transferred the note to the plaintiff. That the interest on said note, to the date of the report, was $26.80, making the whole amount due thereon $241.80. The referee's conclusion of law, from the above facts, was that the plaintiff was entitled to judgment against the defendants for $241.80. And judgment was accordingly entered for that sum, and the defendants appealed.

James Wood, jun., for the appellants.

G. F. Danforth, for the plaintiff.

By the Court, E. DARWIN SMITH, J. In *Pigot's case*, (11 *Coke's Rep.* 26,) it was resolved that when any deed is altered in a point material, by the plaintiff himself, or a stranger, without the privity of the obligor, be it by interlineation, addition, erasing or by drawing a pen through a line or through the midst of a material word, the deed thereby becomes void. The court of king's bench, in *Master* v. *Miller*, (4 *T. R.* 320,) applied this rule, as thus stated, to a bill of exchange, and declared it applicable to all written instruments. Lord Kenyon says of the *Pigot case*, that it establishes the principle that all written instruments which are erased or altered shall be void. This case was affirmed in the exchequer, in 5 *T. R.* 367, and has ever since been followed by the English courts. In this state

the same doctrine was asserted and adopted by the court for the correction of errors, in the case of *Woodworth*, v. *The Bank of America*, (19 *John.* 391,) in which an indorser was held discharged by an alteration made after his indorsement, but before the inception of the note, by an addition, in a separate memorandum, fixing a place of payment. And the rule of *Pigot's case*, as thus affirmed in the case of *Master* v. *Miller*, is recognized as the rule of the common law in all the states of the Union where the common law prevails. Some diversity of opinion exists in respect to the question how far the rule should be applied to executed contracts, to deeds when the title has passed, and the like cases. The rule is pretty generally repudiated as to such cases, and when the alteration is by a stranger. (8 *Cowen*, 72.) But there seems to be no diversity of opinion, so far as I have been able to discover from the reports of the various state courts, in applying the rule to all executory contracts, subject to one single qualification hereafter mentioned. The difficulty is not with the principle, but with its application. The rule is universally applied to all *material alterations* of deeds, bonds, bills of exchange or other written instruments made by the *holder* without the consent of the party to be bound or affected thereby, when the same are presented, or sought to be used as evidence for the enforcement of an unexecuted obligation or contract. In 11 *Mees. & Wels.* 778, *Davison* v. *Cooper*, (13 *id.* 343, *same case affirmed in error*,) Lord Denman, in giving the opinion of the court, reasserts the rule as laid down in *Pigot's case*, and says of it, "It is highly important, for preserving the purity of legal instruments, that the principle should be borne in mind and the rule adhered to. To say that *Pigot's case* has been overruled, is a mistake. On the contrary it has been extended; the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it." (7 *Serg. & Rawle*, 508. 5 *Lit.* 205. 3 *Har. & J.* 159. 3 *Yates*, 391. 2 *N. Hamp. Rep.* 543. 2 *Watts & Serg.* 438. 22 *Wend.* 393. 24 *id.* 374. 6 *Mass. Rep.* 519.)

The rule in this state, and in most states, is that the question

whether the alteration is *material* is one of *law*, for the court. (7 *Barb.* 564. 5 *Greenleaf*, 200. 4 *How. Miss. Rep.* 414.) And if the alteration palpably appears on the face of the instrument, the burden of proof is upon the party setting it up, to explain the alteration. (2 *Wend.* 535. 22 *id.* 388. 3 *Barb.* 378.) In regard to what is *material* in such cases, in *Chitty on Bills*, the small work by Joseph Chitty, jun., at page 100, it is said, "The alteration of a bill, note or check, in regard to the *date* or *time* of payment, the *place* where it is to be paid, or the *parties* to make the payment, as by adding another drawer or maker to a bill or note as an after-thought, *after it was completed*, is material, and will discharge the parties from responsibility; so with an alteration which varies the *nature* of the liability of the parties, as the making a joint note joint and several, or the addition of words rendering the instrument negotiable." The author means, of course, alteration made without the consent of the parties to be affected, for no party can take advantage of an alteration made with his consent.

As authority for the statement that the adding another drawer or maker to a bill or note is a material alteration, Mr. Chitty refers to two cases, one in *Holt's N. P.* 474, *Clark* v. *Blackstock*, and the other cited as *Ex parte White*, (2 *D. & Ch.* 334.) This last case I have been unable to find. The case in *Holt* was where the defendant signed a simple promissory note as a surety after it had been executed and delivered, with the assent of the maker. It was held by the judge at *nisi prius*, that such addition made the note a *new contract*, and that as such it required a new stamp, under the stamp act; that it became a *new bill*. This would not be so if the alteration was immaterial, or made to complete the instrument. (3 *Esp.* 246, *and* 10 *East*, 469.) In 5 *Monroe*, 25, *Bank of Limestone* v. *Phinney*, where, after the making and delivery of a joint and several promissory note by two, a third person signed it and his name was inserted in a blank left in the body for that purpose, it was held by the court of appeals of Kentucky that it was a material alteration, and that the note was void.

In *Pulliam* v. *Withers*, (8 *Dana*, 98,) where an additional name was put to a promissory note after it was complete, and had become operative, it was held that it avoided the note; but there being some proof of the assent of the prior parties, the question was submitted to the jury whether the addition was made with their consent. In *Gardiner* v. *Walsh*, (32 *Eng Law & Eq. Rep.* 162,) the question was very carefully considered. A promissory note was made by two, and after its delivery to the payee a second surety was added to it without the assent of the prior parties. The case was tried before the chief justice, at the circuit, who instructed the jury that if they believed from the evidence that Clark (the third party or last signer) signed the note *after it was perfect*, at the request of the plaintiff, and without the consent and privity of the other defendants, they should find for the defendants, and the jury so found. A rule nisi was granted, on argument, for a new trial, for the misdirection of the judge. After argument, the decision of the judge was affirmed; Lord Campbell, Ch. J., giving the opinion, in which he says that they were all of the opinion that the rule could not be supported, on the ground "that the signing the note by Mr. Clark did not amount to an alteration of the note and of the liability of the defendant in a material point." If, after the note was perfect, according to the intention of the parties, as the joint and several note of the defendant and Elizabeth Benton, and after it had been completely issued and negotiated, the plaintiff, without the consent of the defendant, had caused it to be signed by Alice Clark as a joint and several maker, along with the defendant and Elizabeth Benton, according to principle and authority, he is discharged from his liability upon it." The learned judge further says: "We conceive that he is discharged from his liability if the altered instrument would operate differently from the original instrument, whether the alteration be or be not to his prejudice." This decision seems to be precisely in point with the present case. Opposed to these cases is one in 9 *Alabama Rep.* 513, (*Montgomery R. R.* v. *Hurst.*) This was a case where, after the making of the note in question. it was signed by two sureties

for the benefit of the payee. The court held that it did not invalidate the note, but admitted *that the identity of the instrument was destroyed by the addition.* There is also a case of the same effect in 8 *Adol. & El.* 136, (*Catton* v. *Simpson.*) This latter case was not much considered, and the opinion is embraced in a few words, and is expressly repudiated and reversed by the foregoing decision of *Gardiner* v. *Walsh.*

Concurring with the foregoing cases in respect to promissory notes are the following, in respect to *bonds.* In *O'Neil* v. *Long,* (4 *Cranch,* 69,) a new signature to a bail bond was made after its execution and it was held void. In *Harper* v. *The State,* (7 *Black.* 61,) a bond was altered by adding to it two obligors, and for that reason it was held void. In *Speake* v. *United States,* (9 *Cranch,* 28,) one name to a bond was erased and another substituted in its place, by consent of parties. Judge Story impliedly recognizes the same rule. He says, "It is clear, at common law, that an alteration or addition in a deed, as by adding a new obligor, or an erasure by striking out an old obligor, *if done with the consent and concurrence* of all the parties to the deed, does not avoid it." In these cases, or some of them, the name of the new obligor was inserted in the bond, but this was not material or essential to their liability. (4 *McCord,* 303. 7 *Cowen,* 484. *Smith* v *Crooker,* 5 *Mass. Rep.* 538.) The common law rule as asserted generally im the English and American cases in relation to deeds, bonds or sealed instruments, is tested by the inquiry whether the defendant has executed a deed which under a plea of *non est factum* can fairly be held to be in legal effect and substance as stated in the declaration. (9 *Cranch,* 28.) In relation to instruments not under seal, the rule in like manner relates to the *identity and integrity of the instrument.* The question is as said by Lord Kenyon in *Master* v. *Miller,* "Whether or not the defendant promised in manner and form stated in the declaration." (7 *Serg. & Rawle,* 505. 19 *John.* 391. 22 *Wend.* 392.) Such is the basis of the rule in every state where it has been asserted, except in the foregoing case in Alabama, and one or two cases in Massachusetts and New Hampshire

where, as in 3 *Metcalf*, 103, the qualification has been superadded whether the alteration was fraudulently made or not. This last inquiry never has been made in the application of the rule, in the English cases, or in this state. This case in Alabama conflicts in principle with the cases in our own courts, where the rule has been asserted. (19 *John.* 391. 24 *Wend.* 376. 8 *Cowen*, 72. 3 *Barb.* 376.) The alteration is as *material* as the alteration in either of the foregoing cases. The relative rights and liabilities of the parties are thereby varied. (1 *Gilman*, 490.) Applying the rule above suggested in respect to sealed instruments, certainly the plaintiff could not recover on the note, if it were sealed, under a plea of *non est factum.* It would not be the deed of the defendant. It is not in the shape it was in when signed by them. It is not their contract in that shape. Applying the rule also stated or suggested by Lord Kenyon, in the case of *Master* v. *Miller*, to it as a promissory note, the plaintiff could not recover upon it under *non assumpsit.* The complaint declares upon it as a note made by the defendants and John A. Murray, and payable to bearer. The actual note was made payable to John A. Murray or bearer, and was signed by the defendants alone. Here is a substantial misdescription of the instrument as signed by the defendants. The defendants say, in effect, that in manner and form stated they never made such a note, and the answer is true. There is a failure to prove the complaint in its entire scope and meaning, within section 171 of the code. The case is not one of variance under section 170. The weight of authority upon this question, in England and in this country, is certainly against a recovery by the plaintiff in this case, on the ground that the addition of another maker is a material alteration of the note. The judgment should be reversed and a new trial ordered. Possibly the plaintiff may prove that the defendants consented to the alteration in question, and if so the defendant would be estopped from making the defense.

Judgment reversed and new trial granted.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

BANGS, receiver &c., *vs.* J. & M. McINTOSH.

23 591
25 121
28 37
35 422
37 43
37 631
51 515
56 599
1h 639
26h 307
18a 592

A receiver, or other party commencing a suit in the supreme court under a special authority, must state in his complaint that he has been duly appointed receiver &c., and if issue is taken upon that allegation, he is bound to make due proof thereof.

The section of the revised statutes, authorizing the property of an insolvent corporation to be sequestrated, and a receiver to be appointed, contains a special delegation of power over such corporations, to be exercised in a prescribed manner, and upon a particular state of facts; and like all cases of authority delegated by statute, affecting liberty or property, the prescribed form for obtaining jurisdiction of the person and the subject matter, must be strictly pursued.

The proceeding is not a continuation of the original suit, but is an original proceeding in the supreme court, as a court of equity, in which the presentation of the petition is the first step, and is the act which confers jurisdiction.

Before the court can lawfully order the sequestration, and appoint a receiver, it must have a petition from the *creditor in the judgment*, or his legal representatives, setting forth the due recovery of a judgment in a court of law, or decree in equity, with the due return of an execution thereon issued, unsatisfied, in whole or in part. This is essential to confer upon the court the slightest power or authority to proceed in the case.

A petition signed by, and in the name of *the attorney* for the judgment creditor, is not sufficient to confer jurisdiction; and an order made thereon, for the sequestration of the property of a corporation, and the appointment of a receiver, will be unauthorized and void.

And an order subsequently made by a judge at special term, granting leave to amend such petition, and an amendment in pursuance thereof, will not cure the defect, but will be merely adding another nullity to the prior nullity.

When the supreme court has acquired jurisdiction, it may amend any process or proceeding to retain it, and carry out and effectuate its object, in furtherance of justice. But it cannot make a void proceeding valid by an amendment in the same proceeding or matter.

And it is a fundamental rule, that where there is an absence of jurisdiction, the defect cannot be supplied by amendment or supplemental proceedings, so as to make the void proceedings valid from the beginning.

An assessment, made by the receiver of a mutual insurance company, upon the premium notes, is not complete and consummated until it is ascertained, fixed and determined, by carrying out upon the extension book the amount which each member is to pay.

And the notice of such assessment, if published before this is done, is premature.

The notice should state the amount which each member is to pay. Otherwise it will be insufficient and defective, and will not oblige the members to pay, or subject them to a suit upon the premium note.

Bangs v. McIntosh.

Upon a recovery on a premium note, for the non-payment of an assessment, the plaintiff is not entitled to interest on the amount of the note; the recovery for the whole amount being in the nature of a penalty.

THIS action was commenced March 4, 1853, by the plaintiff, as receiver of the Genesee Mutual Insurance Company, to recover, as a forfeiture, the whole amount of a premium note for $480, with costs, because of the non-payment of three assessments thereon, which in the aggregate amounted to $6.10. The plaintiff claiming such forfeiture under § 10 of the charter of the insurance company, (*Laws of* 1836, *pp.* 318, 42,) on the ground of failure to pay the assessments within thirty days after the notice mentioned in said section. The answer was a general denial, and also a statement of various irregularities in making up the assessments. The cause was tried at the Monroe circuit in April, 1856, before Justice WELLES, and a jury. The plaintiff proved that the defendants made and executed a promissory note, of which the following is a copy:

"$480. For value received in policy No. 13088, dated November 2, 1849, issued by the Genesee Mutual Insurance Company, we promise to pay the said company, or their treasurer for the time being, the sum of $480, in such portions and at such times as the directors of such company may, agreeably to their act of incorporation, require."

(Signed) J. & W. MCINTOSH.

And read the said note in evidence. He also proved that the defendants were partners at the time of the date of said note. The counsel for the plaintiff then introduced in evidence the act for the incorporation of "The Genesee Mutual Insurance Company," (*Laws of* 1836, *p.* 318,) and the act for the incorporation of "The Jefferson County Mutual Insurance Company," (*Id. p.* 42.) He also introduced in evidence the by-laws of the said company, and read by-laws Nos. 7 and 25, as follows. "§ 7. The executive commitee shall appoint the general agents, and determine their salaries, investigate and determine the amount of all claims presented against the company, audit all

accounts and report to each annual meeting the proceedings of the previous year."

"§ 25. Notice of assessments shall be given by the secretary, by publication in two newspapers printed in the county of Genesee, for three weeks successively, the last publication of which shall be not less than 30 days previous to the time fixed for payment; and the directors may also cause such notice to be published in handbills, and posted up in such places as they may direct." The counsel for the plaintiff then proved the execution of the policy mentioned in the complaint, to the defendants. He also introduced in evidence a certified copy of a judgment roll in an action in the supreme court, wherein William Lafferty was plaintiff and the Genesee Mutual Insurance Company was defendant, in which H. Wilbur was the attorney for the plaintiff, and Lucius N. Bangs was the attorney for the defendant, and in which the plaintiff recovered judgment against the defendant, on the 29th day of July, 1851, for damages $1068.40, and costs $48.66, and which judgment was on that day docketed in the office of the clerk of the county of Genesee. The counsel for the plaintiff then introduced in evidence a certified copy of an execution issued on said judgment against the property of the defendant, to the sheriff of the county of Genesee, on the 29th day of July, 1851, and also the return of the sheriff upon said execution, that it was unsatisfied, made and filed in the office of the clerk of Genesee county, on the 6th of October, 1851. The counsel for the plaintiff then offered in evidence the following papers, viz: the petition of Harry Wilbur, entitled in the above mentioned suit brought by William Lafferty, in which the petitioner styles himself "the above named plaintiffs' attorney," and prays that the stock, property, things in action and effects of the Genesee Mutual Insurance Company, may be sequestrated, and that a receiver of the said company may be appointed. This petition sets forth the recovery of the judgment by Lafferty, the issuing of the execution, and the return thereof unsatisfied, and states that the company is in very embarrassed circumstances, and has been, for a long time. Also notice of presenting said petition, and motion that the prayer

thereof be granted; and an order granted thereon, at a special term held by Justice Taylor, on the 7th of October, 1851, sequestrating the property, stock and effects of the Genesee Mutual Insurance Company, and appointing Lucius N. Bangs receiver. The plaintiff also offered in evidence, an order made at a special term in Monroe county on the 30th of May, 1853, by Justice SELDEN, amending the petition upon which the order for sequestration and a receiver was granted, by making it the petition of William Lafferty, the plaintiff in the suit in which the judgment against the company was recovered, instead of the petition of Harry Wilbur his attorney.

To this evidence, the counsel for the defendant objected. 1. That the application for the appointment of a receiver was irregular and void; that since the code it could only be done by an action. 2. That if it was not necessary that it should be done by an action, it must be by a special proceeding for that purpose, and could not be done as a part of, or as a continuation of the action in which the judgment was recovered. 3. Mr. Bangs as the attorney for the defendant in the judgment, had no authority to make any admissions, or waive any rights of "The Genesee Mutual Insurance Company," in the proceedings for the appointment of a receiver. 4. The first petition was dated and sworn to a month before the return of the execution. 5. The application for the appointment of a receiver was not made by the judgment creditor, but by H. Wilbur, and the papers do not show that Lafferty had any thing to do with it. 6. The entitling of said petition in the action in which the judgment was obtained rendered it void for any purpose. 7. The amending of the petition, by the subsequent order, could not confer jurisdiction *nunc pro tunc*. 8. The certificate of the clerk to the above papers was defective, as he did not specify which of the "foregoing" the certificate related to, when there were several papers attached together.

The court overruled the objections, and admitted the said papers as evidence in the cause, to which the counsel for the defendants excepted.

The counsel for the plaintiff then offered in evidence the bond of the said receiver, dated October 8, 1851.

The counsel for the defendants objected thereto, on the following grounds: 1. The condition of said bond was not in conformity with the provisions and conditions of the order appointing him receiver. 2. That it did not in its condition comply with 2 *R. S.* 468, §§ 66, 67. The court overruled the objections, and admitted the bond in evidence.

The counsel for the plaintiff then offered in evidence a petition of the receiver for leave to make an assessment, for the purpose of paying the losses and expenses of the company, and an order of the court, made at a special term on the 21st of May, 1852, granting the prayer of the petition. This evidence was objected to as incompetent to prove the regularity or validity of the assessments, but was received. The plaintiff also offered in evidence an order of the court, made at a special term, on the 16th of June, 1852, on the petition of the receiver, classifying the losses and liabilities of the company, and directing the levying of assessments on the premium notes for the purpose of paying losses and liabilities, and for the publication of notice of the assessments. The plaintiff proved the making of an assessment, in pursuance of this order, and the publication of the following notice thereof, in three newspapers published in the county of Genesee, viz:

"Notice is hereby given, that by virtue of an act of the legislature of the state of New York, passed March 19, 1852, entitled 'An act to facilitate the collection of debts against corporations,' and in conformity with an order of the supreme court, made at a special term thereof, held at the court house in the village of Warsaw, in the county of Wyoming, on the 16th day of June, 1852, by the Hon. James Mullett, I Lucius N. Bangs, receiver of the property and effects of the Genesee Mutual Insurance Company, have assessed the premium notes of the said The Genesee Mutual Insurance Company, for losses by fire upon policies of insurance issued by said company, and the incidental expenses of said company, the following rates per cent, to wit: On all of said notes in force on the 19th day

of March, 1851, on the large class notes, .0013, on the small class notes, .0033. On all of said notes in force on the 23d day of May, 1851, on the large class notes, .00288, on the small class notes, .0072. On all of said notes in force on the 26th day of August, 1851, on the large class notes, 00851, on the small class notes, .02127. L. N. BANGS, *receiver*."

June 16, 1852.

The counsel for the defendants objected to this evidence on the following grounds: 1. That there was no evidence that the sum which the defendants should pay as their share of the losses, &c. had ever been settled or determined, and that no valid assessment had been made at the time of the publication of said notice. That the mere fixing of the rate per cent upon which the assessment would be made, was insufficient. 2. That the said notice did not contain or specify the sum which the defendants were to pay. It was only of the rate per cent of an assessment to be made, and not a notice of the sum which had already been settled and determined as their share of the losses; nor did it specify which class the defendant's note belonged to, or which of the two rates per cent it was to be assessed. These objections were overruled by the court, and the notice was admitted in evidence, to which the counsel for the defendants excepted. It was proved that in making the assessment, usually several losses of different dates, near together, were added together in one class, and assessed as of the time mentioned in schedule B, in the book of rates. It was admitted that this action was commenced March 4th, 1853. The counsel for the plaintiff then offered to prove the amount of interest on the sum unpaid on said premium note, to wit, on $360 from the 7th day of August, 1852, to which the counsel for the defendants objected on the ground that the plaintiff was not entitled to recover such interest; which objection was overruled by the court, and the counsel for the defendants excepted; and the amount of such interest was proven to be $93.35, making with the said $360 unpaid on said note, the total sum of $453.35. The evidence here closed, and the counsel for the defendants thereupon moved for a nonsuit on the follow

ing grounds: 1. That the incorporation and organization of the Genesee Mutual Insurance Company had not been proven. That there was no evidence that any affidavit had ever been made or filed, that any portion of the capital had been paid or secured. 2. That the proceedings for the appointment of the receiver were irregular and invalid, and the bond given by the receiver was void, for the particular reasons hereinbefore set forth in the objections of the defendants' counsel to the papers and proofs relating thereto. 3. That no assessment had ever been made, or notice of assessment given; that the mere ascertaining of the rate per cent and giving notice of that rate was insufficient. That to constitute a valid assessment, it was necessary to settle and determine the sum to be paid by each member; and to constitute a valid notice, it must specify such sum, and the name of each person who is to pay. 4. That at the time of the publication of the notice the sum which the defendants were to pay had not been settled and determined. 5. That said notice was also defective, as it did not even give the basis from which the defendants could make their own calculations. It did not state what notes were classified under the large class rate, or what in the small class rate. 6. The said assessment was void for including interest upon the losses up to a time subsequent to the making of the assessment, to wit, up to October 1, 1852, and also for including 10 per cent for future expenses; the receiver having no authority to make any assessments except to pay the debts of the company. 7. The assessments were also invalid for the reason that they were not made on the notes in force at the time when the losses occurred, which the assessments were to pay. 8. The assessments were void because the receiver added together several losses of different dates and included them in one assessment. 9. There was no consideration for the premium note, the policy being void; only three of the directors having approved of the application, or authorized the issuing of the policy, it was not binding on the company.

This motion was denied by the court, and the counsel for the defendant excepted. No other evidence was given in the cause, and the jury, under the direction of the court, rendered a ver

dict for the plaintiff of $453.35; and the court thereupon ordered the exceptions taken in the cause to be heard at a general term, and in the mean time that judgment be suspended

S. Mathews, for the plaintiff.

J. L. Angle, for the defendant.

By the Court, E. DARWIN SMITH, J. A receiver or other party commencing a suit in this court under any special authority, must duly allege his authority in his complaint, and in a traversable form; (*Gillet, receiver*, v. *Fairchild*, 4 *Denio*, 80; *White, receiver*, v. *Joy*, 3 *Kern.* 83;) and if issue be taken upon such allegation, it must be proved on the trial, as much as any other traversable fact. It was necessary therefore for the plaintiff in this action, to state in his complaint that he had been been duly appointed receiver, and as the proceedings on the trial assumed that such fact had been duly put in issue, he was bound to make due proof thereof.

I. The first point made by the defendant's counsel is, that the plaintiff did not prove his own appointment as such receiver. It is a fundamental principle that all courts and judicial officers must acquire jurisdiction before they can make any binding decision, or do any valid act. The principle is no less applicable to this court than it is to all inferior courts or magistrates. And the question of jurisdiction is at all times open to inquiry and investigation whenever and wherever any judicial act or determination is set up or sought to be enforced. (*Borden* v. *Fitch*, 15 *John.* 121. *Mills* v. *Martin*, 19 *id.* 33. *Elliot et al.* v. *Piersol et al.*, 1 *Peters*, 328, 340.) The question whether this court ever acquired jurisdiction to appoint the plaintiff receiver of the property and assets of the Genesee Mutual Insurance Company is distinctly raised and presented for our decision, and we cannot decline passing upon it. The jurisdiction is claimed and was exercised under section 36 of chapter 8, title 4, part 3, page 463 of vol. 2 of the revised statutes, which is as follows: "Whenever a judgment at law or a decree in equity shall be obtained

against any corporation incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied in part or in whole, upon the petition of the person obtaining such judgment or decree or his representatives, the court of chancery may sequestrate the stock, property, things in action and effects of such corporation, and may appoint a receiver of the same." This statute conferred a new power upon the court of chancery. Jurisdiction over corporations was expressly disclaimed by Chancellor Sanford in the case of *The Attorney General* v. *The Bank of Niagara*, (*Hopkins Rep.* 354,) following the case of *The Attorney General* v. *The Utica Insurance Co.* (2 *John. Ch. R.* 371.) This decision in *Hopkins* was pronounced in March, 1825, and was followed in the ensuing month, April 24th, by the act "to prevent fraudulent bankruptcies of incorporated companies and to facilitate proceedings against them. (*Sess. Laws of* 1825, *chap.* 325, *p.* 448.) The fifth section of this act was the same in substance as the above 36th section. This section 36 contains a special delegation of power over insolvent corporations, to be exercised in a prescribed manner or form and upon a particular state of facts. Like all cases of authority delegated by statute affecting liberty or property, the *prescribed form* for obtaining jurisdiction of the person and subject matter must be *strictly pursued.*

In *Bloom* v. *Burdick*, (1 *Hill*, 141,) Judge Bronson says: "In every form in which the question has arisen, it has been held that a statute authority by which a man may be deprived of his estate must be strictly pursued;" and in *Thatcher* v. *Powell*, (6 *Wheat.* 119,) Chief Justice Marshall says, "that a person or public officer with power to divest another of his property, *must pursue with precision* the course prescribed by law, or his acts will be invalid;" and in 7 *Wend.* 148; 13 *id.* 465; 20 *id.* 241; 2 *Coms.* 464, the same doctrine is asserted. The remedy under this section, 36, is summary and of serious consequences. It involves the virtual dissolution of the corporation proceeded against, and the loss of its franchises. It is not like a creditor's bill, a proceeding in behalf of the creditor, for

the creditor instituting the proceedings obtains no preference and is only to be paid ratably with the othercreditors. (*Sections* 37, 79. *Morgan* v. *New York and Albany R. R. Co.*, 10 *Paige*, 290.) The proceeding is not the continuation of the original suit. It must be based upon a judgment at law, or a decree in equity, and the courts of law and equity were distinct when this statute was passed. It is an *original* proceeding in this court as a court of equity. The presentation of the petition is the first step in the proceeding. It is like the service of process to bring a party into court. It is like the presentation, with the petition for the sale of real estate to the surrogate, of an account of the personal estate—held indispensable in 1 *Hill*, 130; or the publication of notice to unknown owners in partition, the omission of which was held fatal, in 11 *Wend.* 647; or the service, in the form prescribed by statute, of the attachment against foreign corporations, as was the case in 3 *Barb.* 536; *S. C., Wright* v. *Douglass*, (10 *id.* 110,) or the obtaining and service of an allowance of appeal, as in the case of *Seymour* v. *Judd*, (2 *Comst.* 464.) The *presentation of the petition* stating the prescribed facts confers the jurisdiction. The statute does not require any service upon or notice to the corporation, but the court would not act discreetly to proceed upon it without notice. In *Devoe* v. *Ithaca and Owego R. R. Co.* (5 *Paige*, 521,) on filing the petition duly verified, the chancellor granted an injunction and made an order for the corporation to show cause why the sequestration and receivership should not be granted. But the court might have proceeded without the notice, and had complete jurisdiction to order the sequestration and appoint the receiver upon the simple presentation of the petition, and error in doing so could only be corrected on motion or by appeal. Before the court could lawfully do this, however, it must have a petition from the *creditor in the judgment*, or his legal representatives, setting forth the due recovery of a judgment in a court of law or a decree in equity, with the due return of an execution thereon issued, unsatisfied in whole or in part. This is essential to confer upon the court the slightest power or authority to proceed in the case.

No one else, under section 36, can lawfully invoke the power of the court to deprive the officers of the corporation of their legitimate control over its property and affairs, and divest it of its franchises. The petition in this case clearly was not such a petition. It is the petition of Harry Wilbur, who describes himself, it is true, as the attorney of William Lafferty, the judgment creditor. But it is none the less the petition of Wilbur. The appellation of attorney for Lafferty, is mere description of the person. (4 *Denio*, 258. 7 *Hill*, 177. 11 *Howard*, 11, 36, *and S. C.* 3 *Kern.* 83.) The presentation of this petition to the court clearly conferred no jurisdiction for the appointment of a receiver under the statute, no more so than if Wilbur had been an entire stranger to Lafferty. The original order therefore, made by Judge Taylor, for the sequestration of the property and effects of the Genesee Mutual Insurance Company, and for the appointment of a receiver of such property and effects, was entirely unauthorized and void.

The subsequent application in the same matter, and the order of Judge SELDEN of the 30th of May, 1853, to amend such petition, does not cure the defect. It is merely adding another *nullity* to the *prior nullity*. (9 *John.* 241, 190. 15 *Wend.* 310. 4 *Cowen*, 504.) When this court has acquired jurisdiction, it may amend any process or proceeding, to retain it and carry out and effectuate its object in furtherance of justice. But it cannot make a void proceeding valid by an amendment in the same proceeding or matter, and I take it to be a fundamental rule that where there is an absence of jurisdiction, the defect cannot be supplied by amendment or supplemental proceedings, so as to make the void proceedings valid from the beginning. (18 *Wend.* 675. 4 *John.* 309. 2 *id.* 190. 13 *How.* 353.) This court is a court of general jurisdiction, and every intendment is in favor of its jurisdiction. (9 *John.* 437. *Foot* v. *Stevens*, 17 *Wend.* 483.) Yet it must proceed according to the forms of law, as much as any other court or officer, and can exercise no power over life, liberty, or property, except by due process. When it has acquired jurisdiction of the person and subject matter, all its errors must be corrected by appeal

or other legitimate mode of review, and no allegation in respect to any such errors as affecting its jurisdiction, can be sustained. (4 *Denio*, 120. 7 *Wend.* 200. *Stanton* v. *Schell*, 3 *Law Rep.* 329.) The only difference between courts of general and courts of limited jurisdiction is, that the jurisdiction is presumed in the former case and must be shown in the latter. (17 *Wend.* 483. 21 *id.* 41.) Want of jurisdiction is equally fatal to the proceedings in both cases. (*Bloom* v. *Burdick*, 1 *Hill*, 139. *Douglass* v. *Stewart*, 10 *Barb.* 110. *The Chemung Canal Bank* v. *Judson*, 4 *Seld.* 254.)

II. But assuming that the appointment of the plaintiff was valid, and was duly proved, it is next objected that the assessment was irregular in various particulars. These objections to the assessment, I think untenable. It was made under the sanction of the court, and if there was any injustice, inequality or irregularity in respect to it, the remedy of the parties affected thereby, was by motion to amend, rectify or modify the assessment. This class of objections, I think cannot be raised on the trial, more than can be irregularities in the ordinary proceedings of a cause before issue or trial. (2 *Hill*, 267.) But this does not apply to the *notice* required to be given by the 10th section of the act, before the commencement of a suit against any defaulting member. By this section the directors are to settle and determine "the sums to be paid by the several members thereof, as their respective proportions of any loss, and publish the same in such manner as they shall see fit, or as by their by-laws shall have been prescribed." The act thus makes a *notice* necessary before the corporation can sue, but leaves it discretionary with the directors to prescribe the manner of the notice. The directors, by their by-laws, prescribed that notice of assessments should be given by the secretary, by publication in two newspapers printed in the county of Genesee, for three weeks successively, the last publication to be thirty days before the day fixed for assessment. This by-law merely fixes the place and time of publication, but does not prescribe the form of the notice. This is left, therefore, to be determined by a construc-

tion of section 10 of the act in respect to the character, office and occasion for the notice.

It seems to me that the notice published, as set forth in the case, does not answer the object, intent and spirit of the requirement respecting it in the charter. I think it defective in two particulars. First, it was premature. It was first published on the 16th of June, 1852. At this time no assessment had been made. The assessment was not completed till several months after that time. All that had been done at that date was the simple ascertainment of the rate per cent for making the assessment. The assessment was not complete and consummated till it was ascertained, fixed and determined by carrying out upon the extension book the amount which each member was to pay. The notice, to be of any practical use whatever; to be any thing else than a mere mockery; should state the amount which each member is to pay. That is clearly what is intended in the charter by requiring notice to be given before suit. The section should have a rational construction—one beneficial to the members—not one that makes it entirely nugatory. The notice published in this case is entirely insufficient and defective. It gives no sort of information to the members. No one could tell from it what sum he was required to pay. To hold the members bound to pay upon such a notice, or be subject to a suit and to judgment upon the whole premium note, would, I think, be highly unjust, as well as a gross perversion of the section in question. The objection, too, that the plaintiff was not entitled to recover interest on the amount of the premium note, I think, was well taken. The amount of the premium note was not *money due*. The right to recover for the whole amount of the note is based upon a default to pay an assessment of $6.10. To allow a recovery of interest in such cases would create an inequality of payment among the members. Those who paid their assessments without suit could not be compelled to pay interest on their deposit notes, and none of the members are liable to pay more than their deposit notes until the liability for a re-assessment arises under section 11 of the act, under which all liable to contribute to a common loss are bound to con-

tribute ratably to an extent not to exceed $1 on the $100 of their respective premium notes. In *The Rensselaer Glass Factory* v. *Reid*, (5 *Cowen*, 587,) Senator Spencer says "that the allowance of interest, as incident to a debt, is founded on the agreement of the parties, and that such agreement may be express or implied." Here is no express agreement to pay interest, and none can be implied except when the principal sum is *justly due*. (*Robinson* v. *Bland*, 2 *Barr*, 1086.) Here nothing is justly due but the assessment of $6.10. The recovery for the whole amount of the note is in the nature of a penalty, and interest is not recoverable upon a penalty. (1 *John.* 343. 3 *Cowen*, 155.)

T. R. STRONG, J., and WELLES, J., reserved their opinions on the first point, and concurred with Justice SMITH in all the residue of the above opinion.

New trial granted; costs to abide the event.

[MONROE GENERAL TERM, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

BLOSS & ADAMS *vs.* BLOOMER.

It being the policy of the law to protect the rights of individuals in respect to their own inventions, labels and devices, and the legislature having passed an act to punish and prevent fraud in the use of false stamps and labels, it seems to be implied that individuals shall not themselves attempt, or allow, any imposition upon the public by the false and fraudulent use of such labels devices, &c

Accordingly *held*, that it was an offense against the spirit of the law, equally injurious to trade and commerce, and equally an imposition upon the public, to palm off spurious goods under cover of genuine labels and devices. And that contracts to do this were clearly against public policy, and should not be upheld and enforced by the courts.

A contract for the sale and purchase of a quantity of empty papers or bags for seeds, with the plaintiffs' labels thereon, to be filled with seeds by the pur-

chaser, and the seeds thus put up to be offered for sale by the purchaser of such papers, in a specified county, and not elsewhere, was therefore held to be void.

APPEAL from an order made at a special term, overruling a demurrer to the second cause of action set forth in the complaint. The first cause of action need not be stated. In the second count of the complaint, and for a second cause of action, the plaintiffs alleged that on the 12th day of December, 1854, at Rochester, the plaintiffs and the defendant entered into an agreement whereby the plaintiffs agreed to sell, and did sell to the defendant, twenty thousand, or thereabouts, empty papers or bags for seeds, with the plaintiffs' labels thereon, and two thousand papers or bags of seeds with the plaintiffs' labels thereon, for the sum of $52.27; that the defendant agreed on his part to pay the said sum for the seeds and bags; to fill said empty bags with seeds of good quality; and sell or dispose of them so filled, and the bags of seeds purchased of the plaintiffs, with their labels upon the same, in the county of Dutchess, in the state of New York, and nowhere else. That the said quantity of bags of seeds and empty seeds bags, with the plaintiffs' labels thereon, were then and there delivered to the defendant except a small quantity of empty seed bags which were delivered a few days thereafter; and that the plaintiffs fulfilled, in every particular, their part of the said agreement. but that the defendant, neglecting his duty in that behalf and wrongfully intending to injure the plaintiffs in their said business and in their reputation as seedsmen, did not fill said empty seed bags with seeds of good quality, and did not sell or dispose of said bags of seeds and empty seed bags to be filled with his own seed, which were sold to him by the said plaintiffs, as aforesaid, in the said county of Dutchess, as he by the said agreement had agreed to do, but filled said empty seed bags with seeds of a poor quality, and sold or disposed of them, together with the bags of seeds sold to him by the plaintiffs, as aforesaid, at divers other places, and in divers other counties than the said county of Dutchess; by reason of which premises the plaintiffs had suffered damages to the amount of $200.

The defendant demurred to the second cause of action, and specified the following grounds of objection thereto, to wit: 1st. That it did not state facts sufficient to constitute a cause of action. 2d. That the alleged agreement set forth in the complaint in respect to the filling of seed bags by the defendant, with his own seeds, and selling them as seeds raised and put up by the plaintiffs, was an agreement to defraud and deceive the public, and no cause of action could arise from its breach by the defendant. 3d. That the condition annexed to said alleged agreement to sell all the said seeds when put up in bags as therein set forth, nowhere else except in the county of Dutchess, was repugnant to, and inconsistent with, the right of ownership in the defendant, as purchaser of the articles sold by the plaintiffs to the defendant, and was therefore void. 4th. That the entire agreement therein set forth was void, as being against public policy and in restraint of trade.

The special term overruled the demurrer, and the defendant appealed.

F. E. Cornwell, for the appellant. The second count of the complaint contains no cause of action, because, I. The contract is on its face a cheat and imposition upon buyers. It cannot be performed without practicing deceit upon the public. The plaintiffs could not permit an indiscriminate use of their labels in this way by third persons, without being parties to the fraud. They virtually say to the public by their labels—"these are our seeds, raised and put up by us—you may depend upon it you are buying a genuine article—you have our experience and care as seedsmen to rely on." This is a falsehood and a deceit—a false representation in a material point. And for granting the right to make such false representations, they cannot upon any correct principle, be entitled to be paid. The defendant could not be compelled to fulfill such a contract. It would be compelling him to cheat the community because he had *agreed* to do so. Suppose, for illustration, an agreement between two persons to palm off upon the community flour of some other description as "Genesee Flour," by putting a false brand upon

the barrel, could either party collect *damages* of the other for failing to carry out the agreement? This is not an action for the *value* of the article sold. It has been paid for. It is simply an action for damages. Suppose again, an agreement by which A. sells to B., for the purposes of re-sale, a horse at a certain price; and as part of the contract, B. agrees with A. to re-sell the horse as of a particular breed, and to represent him to be such; both knowing the representation to be false. B. violates the agreement; can any action be maintained by A. for any damages he may sustain by such breach? Clearly not. For the agreement itself is against good morals. "A claim which is founded upon a transaction which is either *malum prohibitum* or *malum in se*, cannot be enforced by an action of any kind." (*Eberman* v. *Reitzel*, 1 *Watts & Serg.* 181, *cited in* 1 *U. S. Dig. Supplement*, 67.) See also, *Fuller* v. *Dame*, (18 *Pick.* 472,) where it was held that an agreement on which that action was brought, was invalid, as "contrary to public policy and to open, upright and fair dealing." "A contract to do an illegal or immoral act is invalid, and will not be enforced in courts of justice." (*Forsythe* v. *State*, 6 *Ham.* 21.) "Fraud avoids a contract *ab initio*, both at law and in equity, whether the object be *to deceive the public or third persons*, or one party endeavor thereby to cheat the other. For the law will not sanction dishonest views and practices, by enabling an individual to acquire, *through the medium of his deception*, any right or interest." (*Chitty on Contracts*, 678, *and cases there cited.*) One of the cases cited in Chitty is that of a contract for the sale of a picture as one painted by a particular master, which in fact was not painted by him. If it be objected under this head that the contents of the labels are not set forth in the counts, so as to *show* what the plaintiffs profess by it to do or to furnish, we say in reply that that circumstance is in support of the demurrer. For unless it be assumed that the labels advertised that the seeds were raised and put up by the plaintiffs, then the count fails to show that the plaintiffs have any interest which can be injured, and consequently no fact is averred from which the damage can be seen to arise.

And it is thus a further objection to the count that the contents of the labels are not spread out in the complaint.

II. The restraint upon the sale as to territory, is void. The purchase of the articles sold by the plaintiffs and payment of the price, transferred the ownership to the defendant. And the unlimited right of *sale* of the articles purchased, is the very essence of ownership. Nothing short of a copyright could give the plaintiffs control over territory. And even then such control is gone when they have *parted with their title.* The free right of *sale* is one of the essential attributes of *title.* (1 *Black. Com.* 138. 2 *Kent's Com.* 110. *Bouv. Law Dic. tit. Property.* 12 *How. Pr. Rep.* 255.) If real estate be devised *in fee*, a subsequent clause in the will providing that the devisee shall *not* sell is void, as repugnant to the right of ownership. Here the articles were *sold* at a given price, which was paid. The plaintiffs could no longer exercise any control over the article. It was as full a transfer, as in any other case of sale at their counter. The defendant might destroy his purchase, or plant or use or sell it where he pleased, without being liable to account for his acts to the plaintiffs.

J. Van Voorhis, jun. for the respondents. I. The second count in the complaint contains a complete cause of action. It sets forth a contract between the parties and a breach of the same on the part of the defendant, in consequence of which the plaintiffs have sustained damages.

II. The agreement is not an agreement to defraud or deceive the public. If the defendant had fulfilled the agreement on his part, by putting into the bags purchased of the plaintiffs seeds of a good quality, no one could be injured in any manner.

III. The condition in the agreement, that the defendant shall sell the seeds in Dutchess county, and nowhere else, is not inconsistent with the right of ownership of the defendant.

IV. The agreement is not in restraint of trade. The law relating to contracts in restraint of trade has no application to this case. (*Story on Contracts*, 551. *Mitchell v. Reynolds*, 1 *Wms. Rep.* 181. 1 *Smith's Leading Cases*, 430. *Lawrence*

v. *Kidder*, 10 *Barb.* 641. 5 *Mass. Rep.* 223. 7 *Cowen*, 307. 2 *Parsons on Contracts*, 252, 254.)

V. The agreement is not against public policy. "An agreement in not void on this ground, unless it *expressly* and *unquestionably* contravenes public policy and be *manifestly* injurious to the interests of the state." (*Chitty on Contracts*, 664, 658, 659.)

By the Court, E. DARWIN SMITH, J. The legislature, in an act entitled "An act to punish and prevent fraud in the use of false stamps and labels," passed May 14, 1845, (*Sess. Laws of* 1845, *ch.* 279, *p.* 304,) has declared it a misdemeanor either to "counterfeit such stamps or labels with intent to defraud, or to vend goods &c. thus stamped, without disclosing the fact to the purchaser." And this court protects the title of the author or inventor of any names, marks, letters or other symbols which any manufacturer, trader or other person has devised and appropriated or been accustomed to use in his trade or business, and restrains by injunction any unauthorized use thereof to his prejudice. (*Taylor* v. *Carpenter*, 11 *Paige*, 292. *Coats* v. *Holbrook*, 2 *Sandf. Ch. Rep.* 586. *Partridge* v. *Menck*, *Id.* 622. 2 *Barb. Ch. Rep.* 101. *Bell* v. *Locke*, 8 *Paige*, 75.)

If the legislature and the courts are thus sedulous to protect the rights of individuals in respect to their own inventions, labels and devices, it would seem to be implied that such individuals should not themselves attempt or allow any imposition upon the public by the false and fraudulent use of such labels, devices and names or inventions, for the sale of spurious or simulated articles. The fact that the defendant contracted to purchase, and the plaintiffs to sell, a large number of empty papers or bags for seeds, with the plaintiffs' labels thereon, implies, as was doubtless the fact, that the plaintiffs had acquired a high credit with the public for the good qualities of their seeds, and that their labels upon bags or papers of seeds would secure for them a ready sale and at appreciating prices. Money received by the defendant on the sale of the seeds he was to put in these bags and papers sold to him by the plaintiffs, would

be money obtained by deceit and fraud, if not by false pretenses. Perhaps the provision in the contract, that the defendant should fill the bags with seeds of a good quality, might save the parties from a conviction for a conspiracy to commit an act "injurious to trade or commerce," under subdivision 6 of section 8, chapter 1st of part 4th of the revised statutes. But if it be a crime to counterfeit labels, words or devices previously appropiated to distinguish property, or to vend goods thus stamped, without disclosing the fact to the purchaser, it is equally an offense against the spirit of the law, equally injurious to trade and commerce, and equally an imposition upon the public to palm off spurious goods under cover of genuine labels and devices. Contracts to do this are clearly against public policy, and should not be upheld and enforced by the courts. The demurrer in this case to the second cause of action—as the consideration is entire—is well taken, and the decision of the special term should be reversed.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

Mallory *vs.* Gillett.

23 610
29 489
33 213
34 102
21a 412

The plaintiff, having a lien upon a boat belonging to H., for repairs, amounting to $124 61, and refusing to give up the possession of the boat until the amount of his bill was paid, the defendant promised the plaintiff, verbally, that if he would deliver the boat to H. he, the defendant, would pay to the plaintiff the amount due to him for repairs, in manner following, viz: $50 in hand and the balance in two equal installments, at future periods. The boat was accordingly delivered to H. and the defendant paid the $50 in hand. In an action for the balance of the plaintiff's bill; *Held* that the agreement, being an undertaking to answer for the debt of another, and not being in writing, was void by the statute of frauds.

APPEAL from a judgment entered upon the report of a referee. The complaint alleged that before the time of making of the promise of the defendant, thereinafter mentioned

the plaintiff, at the request of one William Haines, placed upon his dry dock in the town of Corning, the canal boat "*Metropolis*," and put repairs upon the same to the amount and of the value of $124.61, for the work and materials of such repairs, and whereby the plaintiff acquired a lien upon said boat for the amount of such repairs, to wit, the sum of $124.61, aforesaid. That said boat being still in the possession of the plaintiff, and he having still a lien thereon for the amount of said bill of repairs, refused to deliver the same to the said Haines until said sum of $124.61 should be paid. And thereupon on or about the first day of July, 1854, at Corning, in said county of Steuben, in consideration of the premises, and that the plaintiff would deliver up the said canal boat to the said Haines at the request of the defendant, he the said defendant then and there promised to pay the plaintiff the said sum of money due for said repairs, to the plaintiff, in manner following, to wit: fifty dollars in hand, and the balance in two equal installments, one to be paid in one month and one in two months, from the time of said promise. That thereupon the plaintiff, confiding in the said promise of the defendant, did deliver up the possession of the said canal boat to the said Haines, and that the defendant thereupon paid the plaintiff the sum of fifty dollars on the same agreement. That the plaintiff, confiding in the said promise of the defendant, has forborne to demand and collect of said Haines the balance due to the plaintiff as aforesaid, whereof the defendant had notice; whereby the defendant became liable to pay the plaintiff the balance of said demand, being $74.61 with interest, &c. Yet the defendant has not paid the same or any part thereof, but to pay the same or any part thereof hath hitherto refused and still refuses, concluding with a demand of judgment for $74.61, with interest, &c.

The defendant answered the complaint in substance as follows: 1. That the promise and agreement stated in the com plaint was and is not in writing, nor was nor is any note or memorandum thereof made in writing, and that the same is therefore void by the provisions of the statute entitled "Of fraudulent conveyances and contracts, relative to goods, chat-

tels and things in action." The second defense set up in the answer need not be stated. The action was, by consent, referred to a sole referee. On the trial before the referee, the defendant admitted the facts stated in the complaint, as therein alleged, and withdrew the second defense contained in his answer. The plaintiff's counsel admitted that the promise and undertaking in the complaint mentioned, was not in writing, and that there was no note or memorandum thereof made in writing, as alleged in the first defense stated in the answer. The parties then rested, and the referee decided that the plaintiff was not entitled to recover in this action, on the ground that the promise or agreement alleged in the complaint and admitted on the trial, was not in writing, and was void by the statute of frauds; to which decision the plaintiff's counsel excepted, and the referee thereupon, on the 25th day of February, 1856, made and filed his report in writing, whereby he found that no facts were proved or established by the plaintiff which were sufficient to enable him to maintain the said action, and that the defendant was entitled to judgment therein. Judgment was thereupon entered in favor of the defendant upon said report, against the plaintiff, with $45.67 costs, from which judgment this appeal was brought.

Geo. T. Spencer, for the appellant.

Geo. B. Bradley, for the respondent.

By the Court, WELLES, J. There is no doubt that the defendant's promise to pay for the repairs of the boat in this case, was valid and obligatory upon him at common law. The plaintiff parted with a substantial right, which was a sufficient consideration to uphold the defendant's promise. It was, however, a promise to pay a debt due from Haines to the plaintiff, with which, it does not appear, the defendant was in any manner connected. The debt was one which Haines had contracted, and which had become complete and absolute before the defendant promised to pay it. It was emphatically the debt of

Haines and not of the defendant; unless the transaction, disclosed by the admissions upon the trial, made it the defendant's debt.

The statute declares that "Every special agreement to answer for the debt, default or miscarriage of another person" shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith. (2 *R. S.* 136, § 2.) In the case before us the agreement of the defendant was not in writing, and the question to be considered, is whether it belongs to the class which the statute declares void for that reason.

The first legislation upon this subject in England, was the statute of 29 Charles 2, chap. 3, § 4, which declares that no action shall be brought whereby to "charge the defendant upon any special promise to answer for the debt, default or miscarriage of another" * * * "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized." The first statute of frauds in this state was passed on the 26th of February, 1787, the 11th section of which is nearly a literal transcript of the 4th section of the statute of Charles 2, above referred to. (1 *Greenl. Laws*, 385, § 11. 1 *R. L.* 78.) The only difference between the foregoing statutes and the law as declared in our revised statutes, is, that by the latter, the words "special agreement" are substituted for "special promise," and requiring the writing to express the consideration of the agreement. But the kind and character of the debt, the promise or agreement to pay which is required by the revised statutes to be in writing, is undeniably the same as that intended by our statute of 1787, and also by the statute of Charles. From the time of the enactment of the last mentioned statute to the present time, the books of reports abound in cases and adjudications upon questions arising, or being supposed to arise under it, and under our statutes, on the same subject. And it is to be confessed that there is not to be

found among them that harmony of judicial decision which is desirable. Many rules have been introduced and adopted by different courts and judges, by which to determine the application of the statute to particular cases; and it is to be feared that the ungraciousness of the defense in a clear case of a promise which would have been good at common law, has not, in some cases been without its influence.

The question has most frequently been, whether the agreement was original or collateral; and that has often been made to depend upon whether the agreement was founded upon a new consideration of benefit to the promisor, or harm to the promisee. Another criterion which has been resorted to in some of the reported cases, has been that the debt due from the original debtor to the original creditor, must be extinguished, in which case, the promise is original and valid without being in writing, but that if it continues subsisting, it is within the statute, and is void unless in writing. In my opinion, none of these are safe and reliable tests. The only inquiries in such cases should be; 1st. Was the promise valid at common law? 2d. Was it to answer for the debt, default or miscarriage of a person other than the promissor? and 3d. Was the promise in writing?

In the case at bar, the defendant's promise was to pay the debt of Haines to the plaintiff; nothing more, and nothing less. It was unquestionably valid and obligatory at common law, being founded upon a concurrent consideration of harm to the promisee, viz. the relinquishment by the plaintiff of his lien upon the boat for the repairs. If the statute had never been enacted, a consideration for the promise would have been just as necessary as it is under the statute, and no more so. As the debt of Haines was pre-existing at the time of the defendant's promise, a new consideration, concurrent with the promise, was necessary to support it, either at common law or under the statute, which only operates upon promises or agreements, which are valid, but for its provisions. It has wrought no change in the law, as to what shall constitute a valid agreement, but has respect only to the means by which the agreement shall be manifested. To hold, that in the case of

a previously existing debt, due from a third person, a promise to pay it is not within the statute because of some new consideration moving between the newly contracting parties, would be, as it seems to me, equivalent to saying, that if the promise be good at common law, a writing is unnecessary, and in effect, to disregard the statute, which contains no such qualification. (*Simpson* v. *Patten*, 4 *John.* 422. *Jackson* v. *Rayner*, 12 *id.* 291. *Barker* v. *Bucklin*, 2 *Denio*, 45. *Fish* v. *Hutchinson*, 2 *Wils.* 94.) In *Buller's Nisi Prius*, a work of deservedly high reputation, it is said at p. 281, that "many of the doubts upon this statute have arisen, by making use of the word *collateral*, which is not a word used in the act of parliament. The proper consideration is, whether it be or not, a promise to answer for the debt of another; for if it be, though it be upon a new consideration, and therefore, strictly speaking, not a collateral undertaking, yet it is within the statute."

In *Barker* v. *Bucklin*, (*supra*,) Jewett, J., who delivered the opinion of the court, says at pp. 59, 60, "It is difficult, it seems to me, to hold that a particular promise to pay the debt of a third person, is obligatory on the promisor, and not within the statute of frauds, although not in writing, because it is founded upon a new and distinct consideration. The idea of the necessity of a new consideration to uphold a promise of one person to pay another's debt, I apprehend, is only applicable, to such promise, made in a negotiation between the creditor and such person proposing to pay the debt of another to the creditor. There, it is well settled that a promise by such person, even in writing, to pay a debt already incurred, is not available if there be no new consideration." Citing *Chitty jun. on Contracts, ed. of* 1842, *p.* 52, and *Leonard* v. *Vredenburgh*, (8 *John.* 29.) The learned justice proceeds: "And where there is a new consideration for the promise by one to pay the debt of another, the promise is void by the provisions of the statute, unless the agreement or some note or memorandum thereof, expressing the consideration, shall be in writing.' Where the transaction is such, that the debt thereby becomes the debt of the promisor, then, indeed, if the promise be valid

at common law, an action may be sustained upon it, without a writing; for the reason that the promise is to pay his own debt; as, for example, where A. is indebted to B. and C. becomes indebted to A.; in consideration whereof, and at A.'s request, C. agrees to pay to B. the debt which he owes to A. And although, if C. fulfills his promise, the effect is to satisfy the debt due from A. to B., the promise of C. is, nevertheless, to pay his own debt. Such was the principle of the decision in *Barker* v. *Bucklin*, above cited, and of a large number of cases referred to by Jewett, J., in that case. But it will not do to say that the promise, although upon sufficient consideration, makes it the debt of the promisor, for that would dispense with a writing in all cases, and would, in effect, be abrogating the statute.

One of the earliest cases under the English statute upon this question is *Stephens* v. *Squire*, (5 *Mod.* 205,) where an action had been brought against Squire, an attorney, and two others, for appearing for the plaintiff without a warrant. The cause was carried down to be tried at the assizes; when the defendant promised that in consideration the plaintiff would not prosecute the action, he would pay ten pounds and costs of suit. It was objected that the promise was within the statute; but the court held that it could not be said to be a promise for another person, but for his own debt, and therefore not within the statute. The same case is found in *Comberbach*, 362, where Holt, Ch. J., is reported as saying, "if A. say don't go on against B., and I will give you £10 in full satisfaction of the action, this would be within the statute." In *Farley* v. *Cleveland*, (4 *Cowen*, 432,) the plaintiff sued the defendant in the common pleas of Washington county, declaring specially that one Moon, on the 22d of November, 1815, gave the plaintiff a promissory note for $100. That on the 1st of January, 1817, Cleveland, in consideration of 15 tons of hay, (value $150,) sold and delivered by Moon to him, at his instance, promised to pay the note of Moon to Farley. On the trial the above facts appeared, but the defendant's promise to pay the note of Moon was not in writing, for which reason the common pleas

nonsuited the plaintiff. Upon a writ of error to the supreme court, the judgment of the common pleas was reversed, the court holding that the promise of Cleveland was not within the statute. The case was unquestionably decided right by the supreme court, for the reason that the promise by the defendant was to pay to the plaintiff his own debt which he owed to Moon. It cannot be upheld upon any other principle. I do not fail to notice that Savage, Ch. J., who delivered the judgment of the court, after reviewing the cases, at the conclusion of his opinion, says: "In all these cases, founded upon a new and original consideration, of benefit to the defendant or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery." If the learned chief justice means by this, that a consideration of harm to the promisee, simply, unconnected with advantage to the promisor, is sufficient to take a case out of the statute, I must respectfully dissent from him. I cannot believe he intended any such thing. In all the cases which he cites in support of the decision, where the plaintiff was allowed to recover without a writing, the defendant might properly be treated as promising to pay his own debt, or where he had received a consideration from the original debtor which bound him at common law, either expressly or by implication, to such original debtor, or which would form a good consideration for his promise to the debtor to pay the debt to the plaintiff, in which case he would himself owe to the original debtor the payment of the debt of the latter to his creditor.

In *Barker* v. *Bucklin*, Jewett, justice, in speaking of the case of *Farley* v. *Cleveland*, says: "I agree that the case was well decided, but I think a wrong reason was given for it." And in another part of his opinion he says, (*p.* 58,) it was not the case of a promise to pay the debt of a third person.

The case of *Charter* v. *Beckett*, (7 *T. R.* 207,) was, in principle, much like the one under consideration. There, the plaintiff had brought his action against one Harris, for a debt due from Harris to him, and had incurred other expenses in attempting to collect his debt. The defendant agreed, in consideration

that the plaintiff would discontinue the action against Harris and accept a composition of 10s. in the pound upon his debt, to pay the composition and the said costs and expenses. The action against Harris was discontinued, and the defendant paid the composition. The action was brought against the defendant to recover the costs and expenses, amounting to £20 10. Lord Kenyon nonsuited the plaintiff on his opening, and the court of king's bench refused to set the nonsuit aside; holding that the agreement to pay the composition was within the statute, and not being in writing was void; and the agreement being entire, the plaintiff could not separate it, and recover on one part of it, the other being void. The case of *Slingerland* v. *Morse and others*, (7 *John.* 463,) is thought to be a strong authority for the plaintiff. In that case the plaintiff had distrained the goods of his tenant for rent in arrear, to the amount of $450, of which notice was given to the tenant, accompanied with an inventory of the articles distrained, but the goods were not removed. The defendants, at the request of the tenant, signed an agreement indorsed on the back of the inventory, as follows: "We do hereby agree to deliver to Peter Slingerland all the goods and chattels contained in the within inventory in six days after demand, or pay the said Peter 450 dollars. June 7, 1809." The defendant thereupon suspended the sale of the goods and left them in the house of the tenant. The plaintiff's counsel offered to prove a demand of the goods, and refusal, prior to the commencement of the action. It was objected that the agreement was a mere collateral undertaking, and as no consideration was expressed, or appeared on the face of the writing, it was void. The judge being of that opinion, rejected the evidence offered, and nonsuited the plaintiff. The supreme court set aside the nonsuit, holding that the agreement of the defendants was an original, and not a collateral undertaking; relying upon the case of *William* v. *Leper*, (3 *Burr.* 1886.) There is no principle upon which either the case of *Slingerland* v. *Morse*, or *William* v. *Leper*, can be upheld, except that of regarding the defendants in each as promising to pay their own debts. If they are treated as promises to pay the debt of the tenant

in each case, and not their own debts, the decisions, in my judgment, are indefensible and unsound, and directly in contravention of the statute. In the case in *Burrow*, Taylor, the plaintiff's tenant, had become insolvent, and had assigned all his goods for the benefit of his creditors, who employed Leper, the defendant, to sell the goods, and he accordingly advertised them for sale. On the morning of the day they were to be sold, William, the landlord, came to distrain the goods, which had not been removed from the tenant's house, for three quarters of a year's rent. Leper, having notice of the plaintiff's intention to distrain the goods, promised to pay the rent if he would desist from distraining; and he did thereupon desist. The question was whether this promise, not being in writing, was within the statute of frauds, and the court of king's bench held that it was not. Lord Mansfield said: "This case has nothing to do with the statute of frauds. The *res gestæ* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge. He enters to distrain; he has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff paid in the first place. The goods are the fund. The question is not between Taylor and the plaintiff. The plaintiff has a lien upon the goods. Leper was a trustee for all the creditors and was obliged to pay the landlord, who had the prior lien." Wilmot, justice, remarked that "Leper was the agent of the creditors. He makes this promise in order to discharge the goods from this distress. I consider this distress as being actually made. Leper says, 'if you will quit the goods and disincumber the fund, I will pay you.' Leper becomes the bailiff of the landlord, and when he had sold the goods the money was the landlord's (as far as £45) in his own bailiff's hands. Therefore, an action would have lain against Leper, for money had and received to the plaintiff's use." Yates, justice, said: "The defendant was in possession of the goods and about to sell them. The plaintiff entered with intent to distrain them for £45. The defendant says, 'Let me go on and sell them and I will pay you the £45.' He undertook to pay this in all events, peremptorily and absolutely. This is an

original consideration to the defendant." Aston, justice, said: "If this was a promise to pay the debt of Taylor, I should think it within the statute, upon Sir Fletcher Norton's distinctions, which are the true ones. But I look upon the goods here, to be the debtor; and I think that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for £45. The goods were a fund between both, and on that foot I concur."

It will be seen by the opinions of the several judges in the last case, that the liability of the defendant was put upon the ground that Leper was the agent of both the plaintiff and the other creditors of Taylor, and had in his hands a fund upon which the plaintiff had a prior lien; and upon that ground, I think the case was properly decided. It had become his own debt, which Leper, the defendant, promised to pay, and therefore was not within the statute.

Perhaps the case of *Slingerland* v. *Morse* can be placed upon the same or similar grounds. If it cannot, it was erroneously decided, and should not be followed. I incline to think that the goods of the tenant, in that case, were, in judgment of law, in the possession of the defendants. If they were, a fund was thereby provided by the original debtor, and placed at the disposal of the defendants, by which they had it in their power to fulfill the engagement they had entered into with the plaintiff at the tenant's request, and out of which arose an obligation on the part of the defendants, to the tenant, to perform one or the other of the alternatives of their agreement. If that is a just view of the case, it was properly decided.

It will not do to overlook, in this connection, the case of *Mercein* v. *Andrus and Mack*, (10 *Wend.* 461,) cited and relied upon by the plaintiff's counsel. On the trial of that case, the levy of an execution in favor of the plaintiff against one Reed, for $253.83, on the property of Reed, was shown; and it was proved that after the levy it was proposed that the defendants should indorse a note for Reid, payable at the bank, for $150, and that the property levied upon should be released. The case assumes

that the defendants were partners, although that is not stated as a fact proved. The property levied upon was released from the execution. The evidence tended to show that the defendant Andrus, in consideration that the property should be released, promised that the defendants should indorse the note of $150, but there was no evidence that the other defendant, Mack, agreed to the arrangement, except that the witness stated that according to his best recollection and belief, he was present and conversed on the subject, but he was not positive. His strong impression was that he was there. The defendants insisted that the promise being to pay the debt of a third person, and not being in writing, was void within the statute of frauds; and that Andrus could not bind his *partner*, except in partnership concerns. The circuit judge ruled that a promise, founded upon the consideration of surrendering up property levied on by execution, is an original undertaking, and need not be in writing; and upon the other point he instructed the jury that if they believed Mack was present at the time of the arrangement, and heard it made by his partner, the law would presume that he assented to it and he would be bound by it. The jury found for the plaintiff, and the supreme court set aside the verdict upon the ruling of the circuit judge in relation to the liability of the defendant Mack. Upon the other point, Savage, chief justice, says: "The judge correctly stated to the jury, that where the promise of one person to pay the debt of another was founded upon the consideration of surrendering up property levied on by an execution, the promise was an original undertaking, and need not be in writing to be valid; that it was not within the statute of frauds." This is all that is said by the court on the question now under consideration. No authority is referred to by the court or the counsel in support of the *dictum* of the chief justice. If it is sound, it in effect decides the present case for the plaintiff. In reference to the case, I remark, 1. That the remarks of the chief justice, above recited, are the merest *obiter dicta*, not necessary for the decision of the case, a new trial being granted upon another ground; and 2d. That it cannot be

and is not good law, being opposed to the letter and spirit of the statute, and utterly subversive of it. It assumes the promise to have been made to pay the debt of a third person, which the statute declares to be void unless in writing. If Reed had transferred the property levied upon to the defendants, or if they had made any valid contract with him to pay his debt to the plaintiff, and they had, in consideration thereof, promised Reed to pay it, then, manifestly it would have become their own debt, and no writing would have been necessary to make it obligatory upon them. But nothing of that kind appeared in the case, which could by possibility bring it within the principle of *Barker* v. *Bucklin*, before referred to. If the view of the chief justice is sound, there is no imaginable case of a promise to pay the pre-existing debt of a third person which needs a writing to make it valid; for whether the promise be in writing or by parol, a new consideration is equally necessary.

I forbear any further reference to authorities. It would be an unprofitable task to review all the reported cases upon the subject. To attempt to reconcile them would be hopeless. Those which I have referred to are taken from different periods since the enactment of the first statute on the subject, from among the earliest to the most recent. There are enough of high authority to sustain the views and the distinction I have presented, which I am satisfied are in accordance with the plain meaning and comport best with a just construction of the statute. It remains only to apply the statute as thus interpreted to the case before us.

I have already said that the promise by the defendant was to pay the debt owing by Haines to the plaintiff. If that was all, and nothing had occurred previous to or at the time of his making the promise, and aside from it, creating an obligation upon him, either to Haines or the plaintiff, it was most clearly within the statute, notwithstanding there was a consideration amply sufficient to uphold the promise, either at common law or under the statute, if the agreement had been in writing. But we shall look in vain for any thing of the kind. The boat was not delivered to the defendant, and no means was put in his

hands by any one, from which to pay the plaintiff. The promise was to pay Haines' debt, and not his own. Suppose the facts in the case omitted the defendant's promise to pay the plaintiff, upon what would his obligation rest? It would be clearly without foundation or existence. If it was his own debt, the law would imply a promise to pay it. No one will pretend that he was liable to any person, aside from the promise. No consideration passed to him. But he promised to pay the debt upon a consideration, not of benefit to himself, but of harm to the plaintiff; good, clearly, but for the statute; but being a promise to pay the debt of another, it was void under the statute, by reason of not being in writing.

It follows, that the judgment entered upon the report of the referee should be affirmed.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

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23 623
38 409
40 295
32a 410

Teunis Dey and Richard V. Dey, assignees of Gerard Dey and Richard V. Dey, *vs.* The Poughkeepsie Mutual Insurance Company.

It is competent for the parties to a policy of insurance to make a valid agreement that an assignment of any interest of the assured, after a loss, shall avoid the policy.

Where a policy provided that in case of any assignment, transfer or termination of the interest of the assured, or of any claim under the policy, whether prior or subsequent to loss, without the written consent of the assurers, the policy should thenceforth be void and of no effect; *Held*, that a transfer of the interest of one of the parties assured, by means of a general assignment of his property, &c. to the other party assured and a third person, made without the consent of the assurers, was within the interdiction of the policy, and released the assurers from all liability thereon.

Insurers have a right to protect themselves against controversies with strangers, or persons other than those with whom they contract, by placing restrictions upon assignments of the policy.

Dey *v.* Poughkeepsie Mutual Ins. Co

THIS is an action upon a policy of insurance against fire, issued by the defendants to Gerard Dey and the plaintiff, Richard V. Dey, on the 15th day of October, 1853, by which the said Gerard and Richard V. Dey were insured in the amount of $1000 for one year, on certain personal property in a store situated in the village of Geneva, in the county of Ontario. The goods, together with the store in which they were situated, were destroyed by fire on the night of the 20th of November, 1853. The policy contained, among other things, a provision that if the same, or any interest therein, should be assigned, without the assent in writing, indorsed thereon, of the defendants, the said policy should thenceforth be null and void. It also contained an additional provision, in the following words: "The interest of the assured in this policy or any claim thereunder, against this company, is not assignable, unless by consent of said company manifested in writing; and in case of any assignment, transfer or termination of the interest of the insured, or of any such claim either by sale or otherwise, whether prior or subsequent to any such loss or damage, without such consent, this policy shall from thenceforth be void and of no effect; and any liability of said company upon such claim shall thenceforth cease."

The policy also contained a provision that it was made and accepted in reference to the classes of hazards and conditions thereto annexed, which were to be used and resorted to, in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for. On the 17th day of March, 1854, Gerard Dey, one of the assured, made a general assignment to Teunis Dey and the said Richard V. Dey, by virtue of which this action was brought in the names of the said assignees of Gerard Dey. It did not appear that the defendants had ever consented, in writing or otherwise, to such assignment. The other facts in the case, so far as is necessary for the understanding of the views of the court, are referred to in the following opinion. The action was tried at the Ontario circuit, held in November, 1855, before Mr. Justice T. R. STRONG, when the plaintiffs obtained a verdict against the de-

fendants for $950. A motion was now made by the defendants for a new trial.

E. G. Lapham, for the plaintiffs.

L. Maison, for the defendants.

By the Court, WELLES, J. After the evidence was closed at the trial, the defendants' counsel moved for a nonsuit upon five distinct grounds, the fifth of which was, that the assignment of the policy was not with the consent of the company. The policy, by its terms, being void if assigned without the consent of the company in writing; and such consent in writing being required, whether the assignment was made before or after a loss. The justice presiding held that each of the defendants' grounds for a nonsuit, excepting the fifth, embraced a question of fact for the jury; and as to the fifth ground, he deemed it most discreet to allow the jury to pass upon the questions of fact, and let the cause be examined at the general term, and refused to grant the motion for a nonsuit; to which the defendants excepted. After the justice had charged the jury, five questions were propounded, to be passed upon by them, to each of which, excepting the fourth, the jury responded favorably to the plaintiffs. The fourth was as follows: "Was the policy in this case, or any claim thereunder, assigned by Gerard Dey to Teunis and Richard V. Dey with the consent of the defendants, manifested in writing?" To which the jury responded, "No."

The defendants' counsel now contends that the policy in question has become inoperative and void, and that all claim under it has been forfeited by the assignment of the interest of one of the assured to the plaintiffs. If he is right in this position, it will supersede the necessity of considering any of the numerous other questions raised upon the trial and discussed upon the argument.

The policy provides, that in case of any assignment, transfer or termination of the interest of the assured, or of any claim under the policy, either by sale or otherwise, whether prior or subsequent

to any loss or damage, without the written consent of the company, the policy shall thenceforth be void and of no effect; and that any liability of the company upon such claim shall thenceforth cease. The assignment made by Gerard Dey, one of the assured, to Richard V. Dey, the other assured, and Teunis Dey, if it passed any interest of the assignor in the policy, or in his claim upon the company in consequence of the loss, was within the interdiction of the policy. If it did not, there is nothing to show why Teunis Dey is a party plaintiff, or why Gerard Dey is not such party. It is not necessary to consider the question, whether such interest of Gerard Dey did pass by the general assignment of the latter, because if it did not, it is clear that the action, by the present parties plaintiffs, cannot be sustained. For the purposes of the present question, I shall assume that the assignment did convey the interest of Gerard Dey in the policy and the claim upon the company in consequence of the loss of the goods insured, or rather, that it was so intended, and would have conveyed such interest, except for the inhibitions of the policy. If the question was upon the clause of the policy against an assignment, first stated, which avoids the policy in case of assignment without the written assent of the company, there would be no difficulty in the plaintiffs' way in this respect; such provisions having been repeatedly held to apply only to assignments made before a loss and during the continuance of the risk. But the parties to this policy have expressly stipulated, by another and distinct provision, that such assignment, *whether before or after a loss*, shall render void the policy. There is no room, therefore, to doubt what the parties intended, which is always the thing to be sought after in the interpretation of a contract. That intention, when not contrary to law, must always govern. The question, then, is, was it competent for the parties to make a valid agreement that an assignment of any interest of the assured, after a loss, should avoid the policy? In my opinion such an agreement is valid and lawful. I am unable to perceive that it would violate any rule of public policy, any more than the prohibition of an assignment before a loss, which is

confessedly lawful and binding. There are doubtless some reasons in support of the latter, which would not apply to the former; but both must rest, for their validity, upon the same general considerations, which grow out of the views which the parties entertain in respect to what their interest or safety requires. Neither of the provisions referred to would probably be affected by an assignment *in invitum*, or by operation of law; but would be intended to mean voluntary assignments, in both cases.

It is contended on the part of the plaintiffs, that the assignment was not within the prohibition, because it was in trust for the benefit of creditors. This does not appear by the case; but assuming the assignment was of that character, it is not perceived how it would alter the case. The provision is against any assignment of any claim of the assured, &c. The object of the company undoubtedly was to protect themselves against controversies with strangers or persons other than those with whom they contracted. This they had a right, as I think, to do, and the court cannot make distinctions between different degrees of violations of the provisions of the policy, or measure their extent. If this assignment had simply been from one of the assured to the other, they being partners, it would not, for the reasons stated by ROOSEVELT, justice, in *Wilson* v. *The Genesee Mutual Insurance Company*, (16 *Barb.* 511,) have affected the policy. But as it is, the company are called upon to litigate with a party with whom they had not contracted, and which their policy protected them against. I think there should be a new trial, with costs to abide the event.

The other members of court concurring in the foregoing views, it was so ordered.

[MONROE GENERAL TERM, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

23 628
30 402
38 109
24h 171
30h 267
40a 188
88a 512

NEWELL and BEARDSLEY *vs.* FOWLER, ex'r, &c.

Where, upon the assignment of a bond and mortgage, the holder guaranties "the collection of all sums of money unpaid upon said bond and mortgage, with costs," it is a condition precedent to any liability of the guarantor, that the assignee shall, within a reasonable time, institute legal proceedings upon the securities, and prosecute the same with diligence to a consummation.

Nothing will excuse the party holding the guaranty from the performance of this condition, except the act of the guarantor himself. It will not suffice for such party to say it would have been of no use to prosecute.

Nor will a waiver, by the guarantor, of proceedings to foreclose the mortgage, excuse the assignee from proceeding against the mortgagor, or his estate, upon the bond.

Such a contract of guaranty imposes upon the assignee the burthen of exhausting, by legal procedings, every remedy which the bond and mortgage give him, before the guarantor's liability will become fixed.

MOTION by the plaintiffs to set aside a nonsuit and for a new trial; ordered to be first heard at a general term. The action was brought originally against Reuben W. Fowler, the defendant's testator, in his lifetime, and was tried at a circuit court held in Ontario county, in November, 1855, before T. R. STRONG, justice, and a jury, when the plaintiffs were nonsuited. The testator died after the trial, and his executor, the above defendant, was afterwards substituted as defendant in the action. Upon the trial the following facts appeared: On or about the 15th day of October, 1837, one Asahel Kent, of Lenawee county in the state of Michigan, executed and delivered to one Malachi Loveland, of Avon, in the state of New York, his bond, conditioned for the payment of $1000, with interest annually, payable within two years from the 15th day of September next before the execution of said bond, and at the same time executed a mortgage to said Loveland to secure the payment of said $1000, and interest, as mentioned in said bond, said mortgage being upon 240 acres of land described therein, situated in Barry county in said state of Michigan; which mortgage was duly recorded on the 14th day of December, 1837. On the 16th of December, 1840, the said bond and mortgage, being unpaid, was assigned by Loveland to the said Reuben W. Fowler, the testator and original defendant. That on the

11th day of January, 1849, the said Reuben W. Fowler assigned and guarantied the said bond and mortgage to Jedediah H. Stark, by an instrument in writing indorsed upon the said bond, in the words and figures following, viz: "For value received of Jedediah H. Stark, being the amount of money unpaid upon the within bond, and the mortgage accompanying this bond, and given as collateral security for the payment of the money mentioned in the condition of said bond, I, Reuben W. Fowler, the assignee and owner of said bond and mortgage, hereby assign, transfer and set over unto said Stark, said bond and mortgage, and all my right and title therein; and I further, for the consideration aforesaid, do hereby guarantee to said Stark the collection of all sums of money unpaid upon said bond and mortgage, with costs. Jan'y 11, 1849.

REUBEN W. FOWLER."

That on the 9th day of October, 1852, the said Stark assigned to the plaintiffs and Erastus Wilber, the one equal undivided half of the said bond and mortgage; and on the 22d day of December, 1854, the said Stark assigned to the plaintiffs all his interest in the said bond and mortgage. That on the 27th day of December, 1854, the said Erastus Wilber assigned to the plaintiff Beardsley all his right, title and interest in and to said bond and mortgage. The foregoing facts appeared as well by admissions in the answer and by allegations in the complaint which were not denied in the answer, as by evidence given upon the trial. The complaint, among other things, contained an allegation that the land described in the mortgage in question had been, prior to the date of that mortgage and at the time of the execution thereof, and hitherto had continued to be, incumbered by mortgages and judgments to an amount far exceeding its value, and that Kent, the mortgagor and obligor, had *long since* died, leaving no property, and for that reason nothing could be collected of him or his estate upon said bond, or by foreclosure or otherwise upon said mortgage. The answer, among other things, contained the following: "And the defendant, further answering, admits that the premises embraced in said mortgage were, at the time of its

execution and delivery of the same to said Loveland, incumbered far beyond its value, and that said bond and mortgage were, in the hands of this defendant, entirely worthless, which fact was well known to said Stark while this defendant held said bond and mortgage." Thomas F. Stark, a witness for the plaintiffs, testified that in the latter part of December, 1854, he was present and heard a conversation between the defendant Reuben W. Fowler and the said Wilber, in which the latter asked him if he wanted him to proceed on the mortgage on the land, and that the defendant said he did not, because it was of no use; the land was of no value; it was not worth proceeding against. That Wilber told the defendant that he wanted it understood, so that the defendant should be satisfied, whether he, Wilber, should proceed or not; the defendant said his word for that; that he need not proceed against it. He said he had sent west by a man who was going to the land, and had found that it was worthless, and that it was of no use to proceed against the land. The defendant said he would take no advantage on that score, in any suit against him. Anna Stark, another witness for the plaintiffs, testified that she heard a conversation between Wilber and the defendant, about the necessity of prosecuting the Loveland bond and mortgage, in which the defendant said he need not make any costs on the mortgage, for it was not good for any thing. The defendant said he did not want any costs made at his expense; that the bond and mortgage were present.

After the plaintiff rested, the defendant's counsel moved for a nonsuit, upon the ground that there was no evidence that the condition of the defendant's guaranty, requiring the holder of the bond to institute proceedings for its collection, against the maker, had been complied with, and that the guarantor was discharged by laches. The justice granted the motion and nonsuited the plaintiffs. There were other grounds stated on the motion for a nonsuit, but they were neither of them such as to call for any consideration, and the motion was granted solely on the above ground.

James C. Smith, for the plaintiffs.

H. O. Chesebro, for the defendant.

By the Court, WELLES, J. The facts established by the pleadings, in connection with the evidence, show that the premises embraced in the mortgage were, before it was executed, and have ever since continued, incumbered of record to an amount exceeding their value, and that at some time between the execution of the bond and mortgage by Kent and the commencement of the action, Kent had died insolvent, and leaving no property. Any legal proceedings, therefore, to collect the money by foreclosure of the mortgage at any time after it was given, or against Kent or his estate at the time of the commencement of the action, would probably have been ineffectual. However this may have been, it was incumbent upon the plaintiffs to have exhausted all the remedies afforded by law, to collect the money secured by the bond and mortgage, as well against Kent or his estate, upon the bond, as by foreclosure of the mortgage, before he had a right to resort to the contract of guaranty, which was, in legal effect, an undertaking that the money could be collected by due course of law. (*Burt* v. *Horner*, 5 *Barb.* 501. *Taylor* v. *Bullen*, 6 *Cowen*, 624. *Van Derveer* v. *Wright*, 6 *Barb.* 547. *Loveland* v. *Shepard*, 2 *Hill*, 139. *Moakley* v. *Riggs*, 19 *John.* 69.) There are numerous other authorities to the same effect. In some of those just referred to, the contract of guaranty was that the debt was collectable *by due process of law*, as in *Moakley* v. *Riggs*. In *Van Derveer* v. *Wright*, the language was, "I guaranty the collectability of the within note." In *Burt* v. *Horner*, it was, "we guaranty the collection of the within note;" and in *Loveland* v. *Shepard*, the language was similar. In all the cases where the guaranty was of *collection*, without the words *by due process of law*, or any equivalent words, the construction has uniformly been the same, and that by a guaranty of *collection* was intended—collection by due process of law. In this case, if it needed any aid to bring the guaranty within the above rule of interpreta-

tion, it is found in the language employed, which is not only a guaranty of collection, &c., but the words "with costs," are added; as in *Taylor* v. *Bullen*, (*supra*,) in which Savage, Ch. J., says "the guaranty supposes that a resort to legal measures might become necessary, and the defendants engage to pay costs on any suits legally commenced." It was a condition precedent to any liability of the guarantor, that the other party to the contract of guaranty should, within a reasonable time, institute legal proceedings upon the securities assigned, and prosecute them with diligence to a consummation. It is not pretended that any thing of this kind has ever been done. Nothing will excuse the party holding the guaranty from the performance of this condition, but the act of the guarantor himself. It was a part of the contract, and it will not answer for the party to say it would have been of no use to prosecute. Conditions precedent must be strictly performed. In *Wood* v. *Worseley*, (6 *T. R.* 710,) which was an action on a policy against fire, one of the conditions was to produce a certificate of the *minister* and *church wardens*, of certain facts. The certificate was not procured; though other evidence of the facts was; and the minister, &c. refused, without cause, to give the certificate. The court of common pleas held this tantamount to a production of the certificate. But the judgment was reversed in the king's bench, after two arguments; that court holding the production of the certificate a condition precedent, and that it was immaterial that the minister wrongfully refused. It was urged by the counsel for the insured, that the condition was performed, *cy pres;* but the court held that nothing could be substituted in place of a strict performance of the condition, according to the contract.

The question of diligence or laches on the part of the plaintiffs or their assignors is not in the case, for the reason that no attempt has been made at any time to collect the money from the principal debtor or his estate, or by means of the mortgage.

To meet this difficulty the plaintiffs contend that they have proved a waiver by the defendant's testator. The evidence touching a waiver, relates entirely to the mortgage. There was

not evidence sufficient to be submitted to the jury of any waiver excepting what related to foreclosing the mortgage. It does not appear that the testator waived proceedings against Kent, or his estate, on the bond. That was as much a part of the condition, as was the proceeding to foreclose the mortgage. It nowhere appears when Kent died, or when he became insolvent, if that were material. It is sufficient that the contract imposed upon Stark and his assignees the burthen of exhausting by legal proceedings every remedy which the bond and mortgage gave them, before the guarantor's liability should become fixed.

In my opinion the plaintiffs were properly nonsuited, and the motion for a new trial should be denied with costs.

Ordered accordingly.

Monroe General Term, March 2, 1857. *T. R. Strong*, *Welles* and *Smith*, Justices.]

Van Marter *vs.* Babcock and others.

By a written contract, made on the 14th of May, 1847, between the plaintiff and the defendants, the former agreed to sell to the latter, all the mint oil which should be produced upon twenty-three acres of peppermint then growing, which should include and cover all the oil of peppermint the plaintiff should raise, grow or distill, or in any way produce or be interested in the production of, for two years from the date of the contract, and the defendants agreed to take and pay for the same, at a specified price per pound. And the plaintiff agreed to discontinue his interest in the production of peppermint oil (with the above exception) until the first of March, 1849; that he would not sell, give or barter away any peppermint roots to any person whatever, until that time; that he would not distill for any other person, excepting for those who should have contracted their oil of peppermint to the defendants; nor sell, rent or give away his distillery, or the use of it, for two years; and that no peppermint roots, except two acres, &c. should be grown, or oil distilled, on his land, until the 1st of March, 1849, excepting for the production of the oil of peppermint called for by said contract. It was further stipulated that the agreement should be null and void in case the growers did not generally enter into an agreement with the defendants by the first day of June, &c In an action

against the defendants, for a breach of this contract, in refusing to receive and pay for the oil of peppermint raised by the plaintiff, on his land; *Held*, that the agreement was not illegal and void as being in restraint of trade, or against public policy; or under the statute against conspiracies to restrain trade; or as being part of a scheme for monopolizing the trade in peppermint oil; but that the same was valid, and capable of being enforced.

MOTION on the part of the defendants for a new trial; ordered to be heard in the first instance at a general term. The action was brought to recover damages for an alleged breach of a contract between the parties, which contract, as set forth in the complaint, was in the words and figures following:

"A contract made between E. C. Patterson & Co. of the city of New York, and Gilbert Van Marter, of the county of Wayne and state of New York: The said Van Marter agrees to sell to the said E. C. Patterson & Co. all the mint oil which is produced upon twenty-three acres of peppermint now growing, which is all I own, or am interested in, and is situated in the town of Lyons, county of Wayne and state of New York; and the quantity which I estimate will be grown upon said twenty-three acres, is about four hundred pounds; it being hereby agreed and understood that this contract shall include and cover all the oil of peppermint I shall raise, grow or distill, or in any way produce, or be interested in the production of, for two years from date; and I agree to sell them the same at the sum and price of one dollar and seventy-five cents per pound, payable on the delivery of said oil; and the said E. C. Patterson & Co. agree with the said Gilbert Van Marter to purchase the same at the rate of one dollar and seventy-five cents per pound, and agree to pay for the same on the delivery of the said oil; and it is agreed and understood that the oil shall be delivered at Dewey & Wells' store, in the town of Lyons, state of New York, on or before the first day of November, in each year, 1847 and 1848; and the said Gilbert Van Marter further agrees to discontinue to be interested in the production of peppermint oil (with the above exception) until the first day of March, 1849, and agrees not to sell, give or barter away any peppermint roots

to any person whatever, until the 1st day of March, 1849, and agrees not to distill for any other person, peppermint or the oil of peppermint, excepting for those who shall have contracted their oil of peppermint to said E. C. Patterson & Co.; nor sell, rent or give away my distillery, or the use of it, for the purpose of manufacturing or distilling peppermint oil, for two years from the date hereof; and do further agree that no peppermint roots, except two acres, which I reserve for seed roots, shall be grown, nor oil distilled, on any part or portion of my farm or farms, or lands occupied by or for me, either by myself or for any other person whatever, until the first day of March, 1849, excepting for the production of the oil of peppermint as sold by me to the said E. C. Patterson & Co. in this contract. And it is further agreed and understood, that this instrument shall be null and void, provided the growers do not generally enter into an agreement with E C. Patterson & Co., by the first day of June, and a notice in writing shall be given to the said Gilbert Van Marter by the said E. C. Patterson & Co. to that effect, during the month of May, inst. Dated this 14th day of May, 1847.

Signed GILBERT VAN MARTER.
E. C. PATTERSON & Co.
By Dewey & Wells."

The breach of the contract assigned in the complaint was, that the defendants refused to receive and pay for the plaintiff's crop of oil of peppermint raised on all his lands and on said twenty-three acres in the year 1848, which the plaintiff averred to be two hundred pounds of oil; which oil, as he alleged, he delivered at the time and place in said contract named, and tendered to said defendants, which they refused to receive and pay for; and that said oil of peppermint was then and there worth only the sum of nine shillings per pound.

The defendants' answer set up several defenses, claiming, among other things, that the contract was made in restraint of trade, and was against public policy, and void.

The trial came on at the circuit in Wayne county in February, 1855, before Mr. Justice STRONG. The plaintiff gave evidence tending to show the execution, by the parties, of the con-

tract above set forth; that the plaintiff tendered the oil which he manufactured in the year 1848, in pursuance of the contract, and that the defendants refused to receive and pay for the same; that the price of peppermint oil on the first day of November, 1848, was but nine shillings per pound, and that the quantity so tendered was about two hundred pounds. After the plaintiff rested his proofs, the defendants, by their counsel, moved for a nonsuit, upon the grounds, among others, that the contract was void, as being in restraint of trade and against public policy; and as being, by its terms, and under the proof part of a scheme for monopolizing the trade in peppermint oil, and was illegal and void under the statute against conspiracies to restrain trade and commerce. The motion was overruled, and the defendants excepted. The plaintiff obtained a verdict for $161.85.

F. E. Cornwell, for the defendants.

Wm. Clark, for the plaintiff.

By the Court, WELLES, J. The only question of any importance, is upon the validity of the agreement between the parties, of May 14th, 1847, which is above set forth. We think all the other rulings upon the trial were correct; and that they do not, any of them, require particular consideration.

It is a well settled rule of the common law, that contracts in restraint of trade are illegal and void, upon the ground that they are contrary to public policy. But such restraint, to be illegal, must be total, either for a limited time or generally. If the limitation be to a particular locality only, the restraint is not unlawful. (*Comyn on Cont. pt.* 1, *ch.* 4, *p.* 55. *Id. pt.* 2, *ch.* 10, *p.* 438. *Michell* v. *Reynolds*, 1 *P. Wms.* 181.) The theory seems to be, that as the prosecution of trade advances the public welfare, the law will not enforce any contract which necessarily diminishes the business and industry of the country. But as it is of no consequence to the public, where a man carries on his trade or occupation, within the state, provided he

is not prohibited from doing so at all: the law recognizes as valid, or as not in contravention of the principle under consideration, any contract which only restricts him to, or excludes him from, a particular locality for the prosecution of his trade. (*See Gale* v. *Reed*, 8 *East*, 80.)

Does the contract in this case fall under the condemnation of the rule in question, as thus stated and explained? The agreement appears to consist of two distinct parts, having two separate objects in view. In the first place the plaintiff agrees to sell to the defendants all the mint oil which is produced upon twenty-three acres of peppermint then growing, the parties agreeing that the contract should include and cover all the oil of peppermint which the plaintiff should raise, grow or distill, or in any way produce or be interested in the production of, for two years from the date of the contract; the defendants agreeing to take the same at a price agreed upon in the contract. So far, it cannot be contended there was any restriction upon the plaintiff as to the quantity of oil he was at liberty to manufacture or produce; on the contrary, he was left at liberty to produce all he chose and where he pleased. The extent of his obligation was to sell to the defendants all he should produce, &c. within the specified time. In the next place the plaintiff agrees to discontinue his interest in the production of peppermint oil (with the above exception) until the first of March, 1849, and agrees not to sell, give or barter away any peppermint roots to any person whatever, until the time last mentioned, and not to distill for any other person, &c. excepting for those who shall have contracted their oil of peppermint to the defendants, nor to sell, rent or give away his distillery or the use of it, &c. for two years; and that no peppermint roots except two acres, &c. shall be grown, or oil distilled, on any part or portion of his farm or farms, or lands occupied by or for him, until the first of March, 1849, excepting for the production of the oil of peppermint as sold by him to the defendants under the same contract. It will be perceived that the exceptions contained in this latter part of the contract, entirely neutralize all expressions or language contained in the instrument, from which

a total restraint could be inferred. All the rights which the first part of it secures to the plaintiff are, in the second, fully preserved. Among them, was the right to manufacture and produce all the peppermint, or the oil thereof, which he was able or chose to manufacture or produce, without restriction. He was only bound to let the defendants have it all at the price stipulated. If they refused to take it all, he would be released, and at liberty to sell it elsewhere. If they received and paid for it according to the contract, no harm would be done to any one. It is impossible to discover that in either event, or in any aspect, there was any thing like such a restraint upon the plaintiff in his business or trade, as the law prohibits.

There is no foundation for the position now taken, that the contract was by its terms and under the proof, part of a scheme for monopolizing the trade in peppermint oil, and was illegal and void under the statute against conspiracies to restrain trade and commerce. (2 *R. S.* 691, 2, § 8, *sub.* 6.) All there is in the contract to afford any color for this objection, is a provision at the close of it, declaring the contract void unless the growers generally enter into an agreement with the defendants; but it is silent as to what agreement is intended or contemplated. It would be too much, to hold the contract illegal, upon an inference merely, that the contract with the growers was to be of an illegal tendency. In reference to whatever of evidence there was upon the trial to support the objection, the justice was not requested to submit the question to the jury, or to give any instructions on the subject, and the verdict settles the question of fact, in favor of the plaintiff, and, as we think, correctly. The motion for a new trial should be denied, with costs, and an order entered that the plaintiff have judgment upon the verdict.

Ordered accordingly.

[Monroe General Term, March 2, 1857. *T. R. Strong, Welles* and *Smith*, Justices.]

WILCOX *vs.* GREEN.

In an action for the breach of a marriage promise, the plaintiff may show her acts of preparation for the marriage.

Where an act of a party is admissible in evidence, his declarations at the time, explanatory of that act, are also admissible as a part of the *res gestæ*.

Where A.'s promise to marry B. is shown, evidence that B. had received A.'s attentions and prepared for marriage by procuring the marriage dress and the wedding cake, and proof of B.'s statements to her sister at the time, explanatory of such acts of preparation, is competent to show her acceptance of such promise.

THIS was an action for the breach of a promise of marriage. It was tried at the Chenango circuit, in March, 1854, before Justice MASON. Among other things the plaintiff's acts of preparation for the marriage were admitted as evidence of her acceptance of the defendant's promise to marry the plaintiff, provided the defendant's promise was made out by other distinct facts and circumstances. And it was decided by the judge that the promise of the defendant must be shown by other distinct facts and circumstances; otherwise the plaintiff's acceptance of it, by her preparation for marriage, would not be admissible as evidence. After the acts of preparation for the marriage were proved, the plaintiff's counsel put this question to the witness: "While her sister (the plaintiff) was making these preparations, did the plaintiff state what they were for?" The defendant's counsel objected to the question as incompetent and irrelevant. The objection was overruled by the court, and the evidence admitted, not as evidence of mutuality, but as evidence of the plaintiff's acceptance of the defendant's promise to marry her, in case the defendant's promise should be made out by other distinct facts and circumstances; and it was ruled that statements made to her sister, explanatory of such acts of preparation, and at the time of such preparation, were admissible for the purpose only of showing the plaintiff's acceptance of the defendant's promise, provided such promise should be entirely made out by other distinct facts and circumstances. The defendant's counsel excepted. The justice, among other things, charged the jury

that it was for them to determine, from the evidence in the case, whether there had been mutual promises to marry, and if the jury should find from the evidence that the parties had mutually agreed to marry, they were next to determine whether there had been a breach of this promise; that the cause was defended on the ground of the general bad character, as well as on the ground of specific misconduct, of the plaintiff, and that he had seldom known a case so entirely defended as this, provided the jury believed the defendant's witnesses; that the jury were to determine what credibility should be given to the evidence of the witnesses, and that if the defendant knew of the general bad character, or the specific misconduct, of the plaintiff, before making the promise to marry, they constituted no defense; and that the question of damages was peculiarly within the power of the jury; but that if the plaintiff was of bad character at the time of the promise of marriage, and that was unknown to the defendant, the verdict ought to be in his favor, and that if the plaintiff, after the promise, had prostituted her person to any other person but the defendant, she clearly discharged the defendant.

There was a verdict for the plaintiff, and the defendant appealed.

A. McDowell, for the appellant.

Henry R. Mygatt, for the respondent. 1st. The plaintiff's acts of preparation for marriage were admissible as evidence of her acceptance of the defendant's promise to marry her *Parsons* states the rule to be: "It has therefore been wisely decided that the contract may be inferred from the conduct of the parties and from the circumstances which usually attend an engagement to marry; as visiting, the understanding of friends and relations, *preparations for marriage*, and the reception of the party by the family as a suitor." (1 *Parsons on Cont.* 545.) 2d. The statements of the plaintiff, made to her sister, explanatory of her preparations of marriage, at the time of said preparation, were admissible for the purpose of showing the

plaintiff's acceptance of the defendant's promise. (*Wetmore* v. *Mell*, 1 *McCook's Ohio R.* 26. 1 *Greenl. Ev.* § 108, *and authorities there cited. Sessions* v. *Little*, 9 *New Hamp. R.* 271. *Hutton* v. *Mansell*, 6 *Mod.* 172. *Peppinger* v. *Low*, 1 *Halst.* 384.)

By the Court, CRIPPEN, J. This action was tried at the Chenango circuit, and a verdict of three hundred dollars rendered for the plaintiff, for an alleged breach of a marriage contract by the defendant. No exceptions were taken to the charge of the judge to the jury. The errors complained of, and to which exceptions were taken, are alleged to have occurred in the admission of testimony on the trial of the action. The court allowed the plaintiff to prove acts of preparation for the marriage, under objection on the part of the defendant. The proof was admitted to establish an acceptance on the part of the plaintiff of the promise made by the defendant to marry her, provided such promise was made out by other distinct facts and circumstances, and if not so made out, the proof was not admissible. After giving evidence of preparation for the wedding, on the part of the plaintiff, proof was offered of the declarations of the plaintiff, made at the time of making such preparations, in order to show what they were made for. The defendant's counsel objected to such declarations; the court allowed the proof for the same purpose above stated, and under the same restriction.

In the manner in which the proof was offered and admitted, I am inclined to consider it competent. It may have had an influence upon the judgment of the jury in establishing a promise on the part of the defendant. The proof was not offered for that purpose; neither was it allowed to be given to establish a promise of marriage. Other evidence was given during the trial in order to establish a promise by the defendant, and sufficient, perhaps, to authorize the jury to find that such promise had been made by him. I have no doubt it was competent for the plaintiff, in the course of the trial, to give evidence of preparations on her part for the wedding; such as procuring wine,

making wedding cake, preparing dresses, gloves and shoes for such purpose. I apprehend there can be no doubt this class of evidence was competent and proper to be given, in order to satisfy the jury that the plaintiff on her part accepted the promise made by the defendant. It appeared from the testimony of the plaintiff's sister that such preparations were made on the part of the plaintiff, some time in the latter part of March or fore part of April, 1851.

The next point in the case is, "was it proper to allow evidence of the declarations of the plaintiff, made by her, and which accompanied the acts of preparation on her part for the wedding?" Where it is necessary or proper in the course of a cause to inquire into the nature of a particular act, or the intentions of the person who did the act, proof of what the person said at the time of doing it, is admissible in evidence for the purpose of showing its true character. (1 *Phillips' Ev.* 231.) The declarations, to be evidence, must be made at the time of the act done, which they are intended to characterize, and such as are calculated to unfold the nature and the quality of the facts they are designed to explain. (*Cowen & Hill's Notes, pt.* 1. *note* 414.) The above is a fundamental rule of evidence of high importance to establish the *res gestæ*, a part of the transaction itself, and without which the truth may not appear. The evidence allowed to show the plaintiff's declarations accompanying her acts at the time of making preparations for the wedding, seem to be clearly within the scope and object of the above rule, and were admissible as a part of the *res gestæ*. The case of *Wetmore* v. *Mell*, (1 *Ohio R.* 26,) is a direct authority for the plaintiff upon both of the above points. In that case, it is true, no objection was made to showing the acts of preparation made by the plaintiff for the wedding, but the court, in considering the objections to the proof given of the declarations of the party, accompanying the acts, expressly decide that not only the acts, but the declarations also, were competent and legal evidence of the acceptance of the defendant's promise to marry her.

The general bad character of the plaintiff was relied upon

as a defense to the action, also specific acts of lewdness were proved by some of the witnesses. The judge stated to the jury that he had seldom known a case so entirely defended, provided the jury believed the testimony of the defendant's witnesses. The jury were called upon to pass upon the credibility of the defendant's witnesses, and to weigh their testimony in deciding the case. No one can doubt that the case was presented to the jury by the charge of the judge in a manner entirely unexceptionable to the defendant. If the jury disbelieved the testimony given on the part of the defendant, of the plaintiff's bad character, and were satisfied that the promise of marriage had been made and broken by the defendant, the damages, in that view of the case, are not excessive. The amount of the damages in such cases rests entirely in the sound discretion of the jury, under the circumstances and evidence before them.

Although in my judgment, based upon the testimony of the witnesses, the plaintiff was unworthy of a husband, and well deserved to be turned out of court without any verdict in her favor, yet I must yield my own views and opinion to the finding of the jury. I am compelled therefore to the conclusion that the judgment must be affirmed with costs.

[Madison General Term, September 12, 1854. *Gray, Crippen, Mason* and *Shankland*, Justices. On appeal to the court of appeals, judgment affirmed, at the March term, 1856.]

23 643
62 310

Coy *vs.* The Utica and Schenectady Rail Road Company.

Where the charter of a rail road company required them to purchase a turnpike road running parallel to the proposed rail road, and to assume the liabilities of the turnpike corporation, and gave them the right to lay their rail road track across and along the bed of the turnpike, but required them to restore the road to its former state, or in a sufficient manner not to impair its usefulness in pursuance of which charter the rail road company purchased the

turnpike road, and laid out and constructed their rail road upon a line designated and located in accordance with such charter, the same being in some places, in close proximity with the turnpike; and the plaintiff, while traveling upon the turnpike, with a horse driven before a wagon, was passed by a train of cars moving on the track of the rail road, at a place where the two roads were very near each other, and the horse, at the sight and noise of the cars, became frightened, and ran off the turnpike, upon certain obstructions placed there by the rail road company in constructing its road, and the plaintiff was overturned and greatly injured; *Held*, in an action to recover damages for the injury,

1. That the plaintiff could not recover on the ground of an encroachment by the rail road, upon the turnpike way, and the negligence of the defendants in omitting to restore the latter to its original width, without proof of an encroachment in fact.
2. That to entitle the plaintiff to a verdict on the ground of the defendants' negligence, she must show that the negligence complained of was the proximate cause of the injury; and that in the absence of such proof, the defendants' liability was a question of law. And hence, that no recovery could be had because of the defendants having excavated earth, on the side of their track, in constructing the rail road, and left there exposed large stones, without erecting any protecting fence between the same and the turnpike.
3. That the defendants having the legal right to construct their rail road track upon its present location, they were not required to abandon that location, or any part of it, by reason of its contiguity to the turnpike; nor were they bound to erect fences, screens or guards between the two roads; neither the rail road charter nor the turnpike charter imposing any such duty, and no such obligation existing at common law.
4. That the fact that both roads were owned by the same corporation added nothing to its obligations or responsibilities; its duties to the public being precisely the same as they would have been were the two roads owned by separate corporations.
5. That in the use and management of the rail road, contiguous to the turnpike, the same responsibilities attached to the defendants that they would assume if the turnpike were a common highway.

Rail road companies, in the use and management of their roads, are bound only to exercise ordinary care; and the omission to erect fences, screens or guards between a rail road and a highway contiguous thereto cannot be considered a want of such care.

THIS action was tried at the Montgomery circuit, and judgment entered for the plaintiff, from which the defendants appealed. The complaint averred that the defendants, in 1849, were the owners of the Utica and Schenectady Rail Road, and of the Mohawk Turnpike, which lay side by side; that the de-

fendants, in constructing their rail road at a place designated, encroached upon the turnpike, greatly impaired its usefulness to the public and rendered it dangerous to travel with horses and carriages "by taking and using a part of said turnpike for their road bed, and omitting to restore the same to its required width; by bringing said rail road into close proximity to said turnpike, and omitting, through culpable carelessness and negligence, to erect any fence, screen or suitable guard between them; by suffering the north side of said turnpike to be obstructed with large stones, and by omitting to erect a fence between the turnpike and such obstructions;" that the plaintiff while traveling on said turnpike with a horse driven before a wagon, was passed by a train of cars moving on the track of said rail road, at the sight and noise of which the horse became frightened, and ran off the north side of the turnpike on to the obstructions aforesaid, whereby the plaintiff was overturned and greatly injured.

The answer admitted the ownership of the rail road and turnpike, and denied every other allegation of the complaint.

On the trial it appeared that the turnpike company was chartered in 1800; the fifth section of the act required the turnpike to be made and maintained at the width of 30 feet between ditches, the bed to be 18 feet wide and kept in good repair. The rail road was chartered in 1833, and the corporation authorized to construct a rail road from Schenectady to Utica, and to transport persons or property thereon, by animal, mechanical or other power. The fifth section of the act authorized the directors of such corporation to select, designate and locate a line for such road, and to file in the county clerk's office certificates of such location, which when done, was declared to be the line of said road. The ninth section declared that the rail road company might intersect and construct their road upon, or across, any highway, by restoring the same "to its former state, or in a sufficient manner not to impair its usefulness." The seventeenth section required that before commencing the use of their road the defendants should purchase the said turnpike; and the eighteenth section vested the rail road corporation, after

such purchase, with all the "rights, privileges, property and estate of said turnpike company, and subjected it to all its responsibilities, duties, liabilities, pains and penalties;" and provided that after said rail road was completed, the turnpike might be abandoned, on notice to the highway commissioners; but until abandoned, the defendants were to keep the same in good repair. It also appeared that the plaintiff, while traveling upon the turnpike at a place where the two roads are in about 40 feet of each other, was overtaken and passed by a train of cars, drawn by a locomotive at the usual speed, at the sight and noise of which, the horse took fright and ran away, and injured the plaintiff as stated in the complaint. There was no fence on the north side of the turnpike, at this place; and beyond the line of the turnpike on the land of one Schenck, and where the plaintiff's wagon was upset, were large stones left by the defendants some years before in excavating earth for their road bed. At this place the two roads lay side by side for about 3000 feet, without there being any fence, screen or other guard between. Upon the question of encroachment, but two witnesses were sworn. One testified "that he built the south wall of the turnpike, about fifteen years previous, as it now stands; that it was laid a little further north than the old wall, but there was but very little difference; the variation was very trifling; was no change except here and there a trifle to get a better foundation; had been no change in the turnpike for twenty-eight years." The other said, "that at the place in question, the turnpike was 23 feet from the north ditch to the wall on the south side, and 41 feet from the wall to the north track of the rail road." The defendants showed that the rail road was constructed upon the line located by its directors, in pursuance of its charter, and then moved for a nonsuit, which motion was denied.

The cause was then submitted to the jury and in his charge, the judge, among other things said, "that defendants had a right to build their road across or along the bed of the turnpike, but was bound to restore the same to its former state, or to leave it in such a manner as not to impair its former usefulness; that if taking a part of the bed of the turnpike for the rail road

track, or bringing the track into close proximity to the turnpike, rendered it dangerous to the safety of persons traveling the turnpike with teams, and thereby impaired its usefulness to the public, the defendants were bound, either to remove the two roads farther from each other, or separate them by protecting guards; if guards would not answer the purpose, the defendants were bound to remove the tracks farther apart; and if the jury found such were the facts, and that the defendants had narrowed the width of the turnpike by taking a part of it for their road bed and omitted to restore it to its former width, or had brought the rail road into such close proximity to the turnpike and omitted all precautions against accidents by putting up proper safeguards, so that the increased noise or sight of the cars had tended to frighten the horse and cause him to start and run, and that that was the proximate cause of the injury, the plaintiff was entitled to recover. That the defendants were bound to use all other precautions against accidents that might happen to persons traveling on said turnpike, by reason of the use of said rail road. To all of which charge the defendants duly excepted. The jury found a verdict for the plaintiff for $1500.

E. T. Schenck, for the plaintiff.

C. B. Cochrane, for the defendants.

By the Court, JAMES, J. This verdict cannot be sustained, unless the injury recovered for was caused by some wrongful or negligent act of the defendants, their agents or servants. The train of cars which frightened the horse was on the defendants' own premises, in its legitimate use, moving at proper speed, and there is no pretense that its management was unskillful, negligent or improper. But the plaintiff based her right to recover, not upon the improper, negligent or unskillful use or running of the trains, but, 1st. Because of an encroachment by the rail road upon the turnpike way, and negligently omitting to restore the same to its original width. 2d. Because

the said rail road corporation excavated earth north of the turnpike and left there exposed large stones, without having erected any protecting fence between the same and the turnpike; and 3d. Because the defendants had brought their rail road into such close proximity to the turnpike and omitted, through culpable carelessness and negligence, to erect fences, screens or suitable guards between them.

Unless there was an encroachment by the rail road upon the turnpike, the first point must fail. Without an encroachment the turnpike was not impaired, and hence there was no omission of duty upon which to predicate negligence. The evidence not only failed to establish this allegation of the complaint, but affirmatively showed that there was no encroachment in fact. As there was no conflict of evidence, this point should have been disposed of by the court, instead of submitting it to the jury.

The plaintiff was not entitled to recover upon the second ground. It was not disputed, that many years previous, the defendants made excavations north of the turnpike, in procuring dirt for their rail road, and that large stones were left in such excavation, and that no protecting fence was ever erected between such excavation and the turnpike; but neither the excavation, the large stones, nor the absence of a fence were the proximate or even remote cause of the accident, for which compensation is now sought. Had there been a fence between the turnpike and the stones, it is barely possible that the plaintiff might have escaped without injury; or in the absence of the excavation or stones, the injury might have been less severe; but it is equally possible that had it all been otherwise, the injury might have been much more severe. However that may be, no action for negligence can be predicated on such probabilities. To entitle the plaintiff to a verdict, it was incumbent on her to show that the negligence complained of was the proximate cause of the injury sought to be compensated; and in the absence of such proof, the defendants' liability was a question of law. (14 *John.* 304.) But there are other reasons why this action could not be sustained on this ground. The excavation

and stones were on the lands of a third person, over which the defendants had no control; neither had they any right to erect a fence, either within the turnpike or on the adjoining close.

This action cannot be sustained upon the third ground, if the defendants were authorized to construct their rail road upon the line located. Their charter authorized the construction of a rail road between Schenectady and Utica, on the north side of the Mohawk river, upon such line as the directors of said corporation should designate; and the proof was undisputed, that this track was constructed upon a line designated and located in pursuance of said charter. It was, however, insisted by counsel, that this right of construction was dependent upon certain conditions which had not been complied with, and reference was made to the ninth section of the act of incorporation, to sustain that position. But it will be seen that that section has application only where the rail road crosses, intersects or encroaches upon a highway, &c. In this case it does neither. The defendants' right to construct the track at this place was fully established; and having such right, negligence cannot be predicated upon its exercise, nor upon the proper use of the track, after its construction. It was most certainly error for the judge to submit to the jury the question whether the limitations and conditions imposed by section nine of the charter had been complied with, when in law such limitations and conditions had no application to the case.

The court also erred in charging the jury "that if bringing the rail road into close proximity to the turnpike rendered it dangerous to the safety of persons traveling the turnpike with teams, and thereby impaired its usefulness to the public, the defendants were bound either to remove the two roads farther from each other, or to separate them by protecting guards." In this part of his charge the circuit judge followed the case of *Moshier* v. *Utica and Schen. R. R. Co.* (8 *Barb.* 423.) That was an action against these same defendants for an accident happening to a horse on this same turnpike, under similar circumstances. But, with due respect for the learned judge who pronounced that decision, I cannot assent to the foregoing prop-

osition. Having the legal right to construct their rail road track upon it present location, the defendants are not required to abandon that location, or any part of it, by reason of its contiguity to the turnpike, or to erect between them "fences, screens or suitable guards." Neither the rail road nor the turnpike charter imposes any such duty, and no such obligation exists at common law. The fact that both roads are now owned by the same corporation, adds nothing to its obligations or responsibilities. Its duties to the public are precisely the same as they would be were the two roads owned by separate corporations. In the use and management of this rail road contiguous to this turnpike, the same responsibilities attach that would attach were this turnpike a common highway; and it has never yet been claimed that where a rail road lay alongside of a common highway the corporation was bound to erect and maintain fences, screens or guards, between such roads. If the obligation claimed exists against the defendants in this case, it does against every rail road in the state under like proximity.

The learned judge, in *Moshier* v. *Utica and Schen. R. R. Co.* (*supra*,) further asserts that "these defendants, aided by the improvements of modern science and stimulated by a laudable spirit of enterprise, were engaged in a mode of transportation unknown to the common law, and which, without the authority of statute would be an indefensible nuisance." Also, that "when rail roads and turnpikes are parallel and in immediate contiguity to each other, persons traveling on the latter with horse teams are sometimes exposed to imminent danger by the mere sight and noise of a moving train. It was in part the anticipation of this danger and the necessity of guarding against it, that dictated the policy of requiring the defendants to purchase the turnpike and assume the liabilities of that corporation before they should be permitted to run cars upon their road." I am again compelled to differ from the conclusion in each of the foregoing propositions. In the former, the defendants having the right given them by statute so to transport persons and property, it may be lawfully exercised. Besides, such roads are now a necessity of the age, and should not be

discriminated against in the administration of the law. (13 *Barb.* 646.) Such corporations, in the use and management of their roads. are bound only to ordinary care, (8 *Barb.* 365,) and the omission to erect fences, screens or guards between a rail road and highway contiguous thereto, cannot be affirmed as a want of such care.

In the latter proposition I conceive the learned judge has entirely misconceived the motive which compelled the defendants to purchase the turnpike. It was private interest, and not public policy, which produced that result. At the time this rail road charter was granted, but little was known of the practical workings of steam power on rail roads, or what would be the effect of the sight and noise of moving trains upon teams traveling on highways contiguous thereto; but it was supposed that the construction and operation of this road would reduce the travel on the turnpike and render its stock valueless, and the risk of a loss was legislated on to the rail road corporation. The fact that this last named corporation was authorized to abandon the turnpike is proof that considerations of public interest did not dictate the act which compelled its purchase.

The plaintiff is not entitled to recover upon either of the grounds on which she bases her action. And, moreover, as on the trial the charge of the judge was erroneous in the several particulars pointed out, and questions were submitted to the jury which should have been decided by the court, the judgment is set aside and a new trial granted; costs to abide the event.

[Washington General Term, January 1, 1855. *Hand, Cady, C. L. Allen* and *James*, Justices.]

GANDAL *vs.* FINN.

LOCKWOOD *vs.* FINN.

MANN, KENDRICK & MANN *vs.* FINN.

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The object of the requirement of the second subdivision of § 383 of the code, respecting statements in writing, on confessions of judgment, was the same as that of the statute of 1818 on the same subject, viz: to point other creditors of the defendant to the precise transaction out of which the confessed indebtedness arose, to enable them to inquire into its truth, and to confine the defendant and the judgment creditor to that particular transaction, in case the good faith of the judgment confessed should be attacked.

But the statement under the code need not be as particular, specific or precise as that required by the former law. It may be concise and comprehensive, but still it must state the facts out of which the indebtedness arose upon which the judgment is confessed.

In those cases where the indebtedness is for property sold, it should state when it was sold, the general nature of the property, and the time of credit, the price or aggregate of the purchase, and the amount of payments, if any.

The language of the code imports that the particular transaction out of which the indebtedness arose shall be specified and identified in the statement.

A statement in these words: "The above indebtedness arose on account, for goods, wares and merchandise, *and property* sold and delivered to me by the plaintiffs, for which I have not paid, and the sum above confessed is justly due to the plaintiffs, without any fraud whatever," *held* defective, and the judgment entered upon it void.

A statement in this form: "The above indebtedness arose on account, for goods, wares and merchandise, sold and delivered by said plaintiff to me since the first day of January, 1855, and the sum above confessed is justly due to the said plaintiff without any fraud whatever," *also held* defective, and the judgment void.

THIS was a motion by Gandal, plaintiff in the first above entitled action, to set aside the judgments entered on confession in the second and third actions. The facts are sufficiently set forth in the opinion of the court.

Hughes & Northup, and *James Gibson*, for the motion.

Millard & King, and *Wm. A. Beach*, opposed.

ROSEKRANS, J. Gandal, the plaintiff in the first above entitled cause, is a judgment and execution creditor of the defend-

ant Finn, and moves to set aside the judgments in the other two causes, rendered by confession under section 383 of the code, on the ground that the statements upon which said judgments were rendered do not comply with the requirements of the second subdivision of that section. The judgments sought to be set aside were both entered up on the 14th of December, 1855, upon confessions dated on that day. The statement in the case of Mann & Kendrick, under this subdivision, is as follows: "The above indebtedness arose on account, for goods, wares and merchandise, *and property* sold and delivered to me by the plaintiff, for which I have not paid, and the sum above confessed is justly due to the plaintiffs, without any fraud whatever." In the case of Lockwood, the statement under this subdivision is as follows: "The above indebtedness arose on account for goods, wares and merchandise sold and delivered by said plaintiff to me, since the first day of January, 1855, and the sum above confessed is justly due to the said plaintiff, without any fraud whatever."

The second subdivision of section 383 requires, in substance, that the verified statements of the defendant, upon which the judgment is to be entered, if the judgment is for money due or to become due, must state concisely the facts out of which the indebtedness arose. The object of this requirement is precisely the same as that of the statute of 1818 in regard to confessions of judgment, and that was to point other creditors of the defendant to the precise transaction or transactions out of which the confessed indebtedness arose, to enable them to inquire into its truth, and to confine the defendant and the creditor to whom the judgment should be confessed, to the particular matter set forth as the foundation of the judgment, in case its good faith should be attacked. The statute of 1818, it is true, required a greater particularity and a more definite specification than section 383 of the code. The former required "a particular statement and specification of the nature and consideration of the debt," and the latter, "a concise statement of the facts out of which the debt arose." It was held that the statement and specifications under the act of 1818 should be

"as special and precise as a bill of particulars, and if the consideration of the judgment was for goods sold, the specification was required to state the kind, quantity and price of the goods and the time of sale, as in a bill of particulars." (*Lawless* v. *Hackett*, 16 *John.* 149. *Brinkerhoff* v. *Marvin*, 5 *John. Ch. R.* 320, 325, 326.)

The statement, under the code, need not be so particular, specific or precise. It may be concise and comprehensive; but still it *must state the facts out of which the indebtedness arose*, upon which the judgment is confessed. If it is to be of any service to the creditors of the judgment debtor, or answer any of the purposes for which it is required, it should, in those cases where the indebtedness is for property sold, state when the property was sold, the general nature of the property, and the time of credit, the price or aggregate of the purchase, and the amount of payments, if any. Unless this is done, the transaction is not identified with or distinguishable from others of a similar character, nor are the words "it must concisely state the facts out of which it arose," satisfied. This language imports that the particular transaction out of which the indebtedness arose, shall be specified and identified in the statement.

Had the legislature intended that the statement should only set forth generally *the nature and consideration* of the debt, they would have employed different language from that used in the second subdivision of section 383. In the language of Dean, J., in *Chappel* v. *Chappel*, (2 *Kern.* 221,) "the intention of the requirement was to compel the person confessing a judgment to disclose what was the real consideration of the judgment confessed, and to show to all interested the transaction out of which the debt originated."

In the view which I have taken of the section of the code under consideration, the judgment in favor of Mann, Kendrick & Mann is void as against the plaintiff Gandal. The statement does not set forth what kind of goods, wares and merchandise sold, constituted a part of the indebtedness; nor how much in value, nor how much of the indebtedness arose out of the sale of *other property;* nor of what kind the latter consisted;

nor where the sale was made. It points to no particular transaction to which other creditors can direct their inquiries, and so far as relates to effecting the objects intended to be attained by the section of the code referred to, it might as well have been entirely omitted.

The statement in the case of Lockwood is not quite so defective as the one in the case of Mann and others, inasmuch as it states that the consideration of the indebtedness was only for goods, wares and merchandise sold and delivered, and states the time of sale to have been between the 1st of January and 14th of December, 1855, and creditors seeking to investigate the good faith of the Lockwood judgment would only have to grope their way through the entire range of property coming within the description of *goods, wares and merchandise*, and through a period of eleven months and a half, while in reference to the Mann judgment these inquiries would necessarily be extended to all kinds of property which could be the subject of sale, and through all time.

I do not, however, consider the statement upon which the Lockwood judgment was entered sufficient to answer the purpose of the statute. The statute is remedial, and should receive such a construction as will satisfy the purpose intended to be effected by it. I think the only difference between the requirements of the statute of 1818 and those of section 383 of the code is that under the latter the judgment debtor is relieved from the minuteness and particularity of detail required under the former.

In cases where the consideration of the indebtedness is property sold, the code does not require the bill of particulars necessary to have been given under the statute of 1818; but the nature of the property should be set forth, with other particulars of distinction than the general statement that it was real or personal property; and the time of the transaction should be specifically stated.

The plaintiffs in the second judgment sought to be set aside were merchants in the city of Troy, and sold goods and other property to the defendant, who was a merchant at Fort Edward.

There is no hardship in requiring them, in case they take a confession of judgment for these demands, to state that on a certain day, specifying it, the plaintiff sold to the defendant, a country merchant, a bill of dry goods for the supply of the store of the defendant, amounting to $100, or $500, or any other sum, stating it truly, upon a credit of six months, upon which the defendant, on a day specified, paid an amount specified, and to repeat the sales and payments in the same manner as often as they have occurred. This would be nothing more than a "concise statement of facts out of which the indebtedness arose;" and this statement would show that the sum for which the judgment was confessed was already due or to become due. A less degree of conciseness than this would defeat the purposes of the act and render it comparatively a dead letter. The motion to set aside the judgments of Mann and others, and of Lockwood, against Finn, should be granted, with ten dollars costs.

[Saratoga Special Term, September 16, 1856. *Rosekrans*, Justice.]

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Charles Devendorf, Receiver of the American Mutual Insurance Company, *vs.* Albert Beardsley.

An insurance company, organized under the general insurance law of April 10, 1849, is, by virtue of the act to provide for the formation of fire insurance companies, passed June 25, 1853, made subject to its provisions; and premium notes received after the latter act took effect are to be made to contribute towards the payment of losses and expenses, as therein provided.

Before insolvency occurs, assessment by the directors is a pre-requisite. After insolvency, a receiver appointed under section 39, 2 *R. S.* 463, takes charge of the property and effects of the company; its deposit notes are assets in his hands; the premium notes are not due, but only to become due when the extent of their liability is determined by assessment; and before an action can be brought, notice must be given of the assessment, and personal demand made. Such assessment may be made by the receiver.

No action can be sustained upon a premium note, given since the act of 1853

took effect, to a mutual insurance company, except it be to pay for losses or expenses actually accrued while such note was in force, and after assessment has been made.

Assessment, or apportionment, is a condition precedent, necessary to be averred in the complaint, and proved on the trial.

An order of the court, directing the receiver to "prosecute and collect the whole amount unpaid on the deposit and premium notes, by any and all legal and proper ways and means," will not authorize the receiver to sue without having made an assessment; inasmuch as the "amount unpaid" on a note, can only be determined by assessment.

Where a person is appointed the agent of an insurance company and empowered to solicit and receive risks of insurance; to receive applications for insurance; and to take premiums and premium notes therefor, this constitutes him a general agent of the company, for the transaction of that particular kind of business; and the company is bound by his fraudulent representations, made in procuring insurances and premium notes.

When a party has been induced to enter into a contract by fraud, he may, on discovering the fraud, rescind the contract; and by restoring the other party to the condition in which he stood previous to making the contract, he may claim a return of what he has parted with, provided he does so at the earliest moment after discovering the fraud.

But where fraud is set up as a defense to an action on a contract, the defendant must aver, in his answer, that he has done all in his power to restore the plaintiff to his former condition; otherwise he cannot prove the fact, on the trial.

APPEAL from an order made at a special term, overruling a demurrer to the defendant's answers. The plaintiff in his complaint alleged that "The American Mutual Insurance Company" was duly formed, incorporated and organized, under the general law of 1849, in June, 1850, and authorized to make insurances, as allowed by section 1, sub. 2, of said act. That policies of insurance were issued by said corporation, and that it continued to carry on the business of insurance, at Amsterdam, until November, 1857. That said corporation being then insolvent, a decree of the supreme court was made, on due notice, declaring that it had forfeited its corporate rights and privileges, and perpetually enjoining its officers and agents from exercising any of its corporate rights, privileges and franchises, and sequestrating its stock, property and effects. That by said decree a reference was ordered, to appoint a receiver, and that the plaintiff was appointed receiver by the referee,

with the usual power and authority of receivers in like cases, and that having duly filed the requisite security, he entered upon the discharge of his duties.

That among the assets of said corporation was the following note, made by the defendants: "For value received in policy No. 13,106, dated February 28th, 1854, issued by the American Mutual Insurance Company, we promise to pay the said company the sum of five hundred and twenty-five dollars, in such portions and at such time or times as the directors may, agreeably to their charter and by-laws, require." That upon such note and the application accompanying the same, a policy of insurance was issued, bearing even date therewith. That in February, 1855, by an order of said supreme court, the plaintiff, as such receiver, was authorized and empowered to prosecute for and collect the whole amount unpaid on the deposit and premium notes held by said corporation, by any and all legal and proper ways and means, or make such an assessment on the said notes, in either or both classes thereof, as might be necessary to pay the debts of the said company. That said order directed that the notes taken by said corporation after its organization, and in the farmers' class, be assessed or collected to pay the losses, debts and expenses in that department, and the residue of the notes be assessed and collected to pay the debts and expenses of the second class. That the plaintiff ascertained that the probable amount of losses by fire, and other liabilities of said company, exceeded the amount of its assets, and that said defendant's note, to the amount of five hundred and twenty-five dollars, was required to be paid for the purposes aforesaid, for losses or damages sustained by persons insured, and expenses accrued only whilst said note was in full force and effect, of which the defendants had notice; yet, &c.

To this complaint the defendant interposed three answers: 1st. A general denial. 2d. That he was induced to take a policy from such company, and give the note in question, by the false and fraudulent representations of one Reynolds, the lawfully authorized agent of said company, that its cash capital then on hand, over and above its debts and liabilities,

exceeded $275,000; averring insolvency at the time, &c 3d. That by reason of this insolvency of the said company at the time of issuing the policy for which this note was given, there was no consideration for the note.

The plaintiff demurred to the second and third answers, on the ground that neither stated facts sufficient to constitute a defense to the action.

D. P. Corey, for the plaintiff.

W. B. Worden, for the defendant.

By the Court, JAMES, J. The plaintiff, as receiver of "The American Mutual Insurance Company," takes its notes and assets subject to all the conditions and legal disabilities with which they were tramelled in the hands of the corporation itself; he cannot impeach or disaffirm its authorized acts, nor the authorized acts of its agents. (*Hyde* v. *Lynde*, 4 *Com.* 387.) If a note in the hands of the corporation was void, or incapable of enforcement, by reason of fraud or illegality in its procurement or inception, passing it into the hands of a receiver does not purge it of those defects. In such cases the receiver stands precisely in the shoes of the corporation; but an obligation assumed or contract made by a corporation not within the scope of its powers, or forbidden by law, may be avoided by a receiver. He is an officer of the court, a trustee for the creditors, and a representative of the corporation.

The second answer avers "that Reynolds was a duly authorized agent of the said insurance company, and empowered by it to solicit and receive risks of insurance; to receive applications from others for such insurance, and to receive premiums and premium notes therefor." This constituted him a general agent for the company for the transaction of that particular kind of business. (*Dunlap's Paley on Agency*, 199, 200.) Were he but a special agent, the corporation would be bound by his fraudulent representations in procuring insurances and premium notes. (*Sanford* v. *Handy*, 23 *Wend.* 260. *Nelson*

v. *Cowing*, 6 *Hill*, 336.) In *Story on Agency*, §§ 134 and 135, it is said, "where the acts of the agent bind the principal, there his representations, declarations and admissions, respecting the subject matter, will always bind him, if made at the same time and constituting a part of the *res gestæ*. Indeed, for most practical purposes, a party dealing with an agent who is acting within the scope of his authority and employment, is to be considered as dealing with the principal himself. If it is a case of contract, it is the contract of the principal. If the agent, at the time of the contract, make any representation, declaration or admission, touching the matter of the contract, it is treated as the declaration or admission of the principal himself." "These principles are fully borne out by the several authorities there referred to—are founded in good sense, and with a just conception of the commercial and other business transactions of life, from which they have been dervied;" and have been recognized as sound by repeated adjudications in this state. (23 *Wend.* 260. 3 *Hill*, 262. 6 *id.* 338.)

In this case the agent was not specially authorized, with limited instructions, to induce the defendant to take a policy of insurance in the company and give his premium note therefor; his powers were more extensive; he was furnished with a roving commission to solicit policies, premiums and premium notes. It was a particular department of business connected with said corporation, wherein he was authorized to act without special instructions; and in the absence of such instructions to the contrary, the right to use the ordinary means and inducements to accomplish the end is implied. (23 *Wend.* 267.) "Where a person is engaged in a particular department of business, and is employed to do an act within his line, with *special instructions*, there the general powers, derivable from the nature of his ordinary employment, *will control the limitation;* he will be held to possess such general powers in the *particular instance*, as his ordinary occupation fairly imports to the public; but in the absence of any such implication of general power, the limitation will control." (23 *Wend.* 266. 13 *id.* 521.) This case is clearly within such rule. The public knew

n thing of the company for whom the agent was seeking insurance risks, and what more natural than that those solicited to take policies should desire to know something of the character, capital and means of the corporation, before becoming members; and of whom could inquiry be made, and who more likely to know than the agent? The corporation was bound to anticipate that such inquiries would be made, and to know that the agent, whether general or special, bound the principal by his answers and representations in reply thereto. It would be intolerable if the principal could avail himself of a contract procured by the false and fraudulent representations of his agent, and not be bound by the fraud. When a party has been induced to enter into a contract by fraud, he may, on discovering the fraud, rescind the contract, and, by restoring the other party to the condition in which he stood before the contract, claim a return of what he has parted with, provided he do so at the earliest moment after discovering the fraud. (1 *Denio*, 69.) That the defendant did this, is not averred in the answer, and unless averred, the fact could not be proved on the trial. (2 *Com.* 361.) For that reason the answer is insufficient.

The third answer is also insufficient. An insolvent insurance company may make a valid policy and acquire a good title to a premium note, if the transaction be not tainted with fraud.

The defendant, however, attacks the complaint, and insists that it does not state facts sufficient to constitute a cause of action, and claims that the order of the special term should be affirmed upon the well settled rule of pleading, as well under the code as before, that judgment on demurrer will always be given against the party committing the first error in substance.

It appears by the complaint, that the insurance company, which the plaintiff claims to represent, was organized under the general insurance act of 1849, and commenced its business in June, 1850. In 1853, an act entitled "An act to provide for the formation of fire insurance companies," (*Laws of* 1853, *p.* 904.) was passed by the legislature. It repealed the act of 1849, and made the then existing corporations, organized under the act of 1849, subject to its provisions, (§§ 20, 28.)

Both acts contemplate as capital two kinds of notes. One, advance notes, as a basis upon which to organize the company and form a capital with which to commence business; the other, notes given as a part of the premium upon policies actually issued after organization. The *first class*, under the act of 1849, (§ 5,) are required to be made payable at the end of, or within, twelve months from date, and are declared *capital stock*, *valid*, *negotiable* and *collectable*, for the purpose of paying *any losses* that may accrue. By the act of 1853, (§§ 6, 13,) such notes are required to be made payable, in part, or in whole, at any time when the directors shall deem the same requisite for the payment of losses and expenses, are declared *capital stock*, and required to remain as security *for all losses and claims*, until the accumulation of the profits shall equal the cash capital required, &c., each note decreasing proportionately as the profits are accumulated. The act of 1849 made no distinct provision respecting the *second class* of notes, but left them to be provided for by the charter and by-laws of each corporation, (§§ 10, 12;) while the act of 1853 provides "that any note deposited subsequent to the organization of any company may, at the expiration of the time of such insurance, be relinquished and given up to the maker upon his paying the proportion of all losses and expenses which may have accrued thereon during the term," and empowers the directors to determine the amount to be given in such cases; declares persons becoming insured in such company members thereof, during the period of such insurance, and bound to pay for losses and expenses accruing, in proportion to the amount of their deposit notes. It also specifies what the charter of each organized company shall contain, and authorizes it to make by-laws. (§§ 4, 11.) I shall hereafter, in this opinion, designate the first of these two classes of notes as "stock notes," the second as "premium notes," and both, jointly, as "deposit notes."

The "stock notes," whether given under the act of 1849 or 1853, are capital stock, and are liable to their full amount for *any* and *all losses* and *expenses* which may arise against the corporation, except in the case of accumulations as provided by

the act of 1853; but "premium notes" are different in their inception and purposes.

In this case the contract is "to pay the company in such portions and at such time or times as the directors may, agreeably to their charter and by-laws, require;" but the complaint does not set forth or state what the charter and by-laws of said company require. If the charter and by-laws are different from, or affected by, the provisions of 1853, they should have been set forth in the complaint, so that the defendant's liability would have clearly appeared. Such a note is payable on demand; but the demand must be made in pursuance of the charter and by-laws of the corporation, or the provisions of the act of 1853. This note having been made and delivered after the act of 1853 became a law, it must be governed by it. (§ 21.) Section 13 of said act declares, that before the corporation can sue for and recover on such note, the directors must ascertain and determine the sum to be paid by each member thereof, which shall be in proportion to the original amount of the note; publish the same; suffer thirty days to elapse after such publication; and make personal demand. It is clear, by the terms of the note and the provisions of said act, that the maker thereof is only liable for the proportion of losses and expenses accruing while it was in force; and before demand for payment can be made upon him, the amount of that liability must be determined by assessment. That should be done by ascertaining the losses and expenses accruing while such note was in force, the number and amount of other "deposit notes" liable to contribute to such losses and expenses, and by apportioning the same upon the whole of said notes which are solvent. (2 *Kern.* 479.) Such is the course to be pursued before insolvency, and the rights of the makers of "deposite notes" in this particular are not changed or affected by the insolvency of the corporation.

By 2 *R. S.* 463, § 36, it is declared, that whenever a judgment has been obtained against a corporation incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied, this court may, upon the petition of such creditor, sequestrate the stock, property, things in action

and effects of such corporation, and appoint a receiver of the same. Section 39 provides, that whenever any insurance company shall have become insolvent, &c. the court may by injunction restrain such officers from exercising any of its corporate rights, privileges, franchises, &c., until the court shall further order. By section 40, such injunction may issue on the application of any creditor, &c., upon action commenced, or petition filed for that purpose, and upon due proof of the facts in the last section required. Section 41 declares, that upon such application being made, and in any stage of the proceedings thereupon, the court may appoint one or more receivers to take charge of the property and effects of such corporation, and to collect, sue for and recover the debts and demands that may be due, and the property that may belong to such corporation. By what proceeding, upon whose action or petition, and under which section of the statute the plaintiff was appointed receiver of the "American Mutual Insurance Company," does not expressly appear from the complaint. If under the 36th section, the court can only sequestrate the property of the corporation, and the plaintiff is merely a common law receiver, to protect the fund during the litigation of the original action. If under the 39th section, the court may restrain the corporation from the exercise of its franchises by injunction, and the receiver, by section 42, is declared to possess all the powers and authority conferred upon receivers appointed in case of the voluntary dissolution of a corporation. That power and authority is defined in sections 67, 68 and 69, 2 *R. S.* 469. Section 67 vests the receiver with all the estate, real and personal, of such corporation, for the benefit of its creditors and stockholders; and section 69 declares, that if there shall be any sum remaining due upon *any share of stock subscribed* in such corporation, the receiver shall immediately proceed and recover the same, &c. The plaintiff insists that his appointment is under section 39, 2 *R. S.* 463, and claims the powers incident to such an appointment. This action is not based upon an assessment, but the plaintiff predicates his right to recover the whole note upon the authority given him by section 69, or so much re-

maining due upon the stock subscribed in such corporation. If this were one of the original "stock notes," there would be much plausibility in the assumption; but that section has no application to a "premium note." Such note is not a "stock note," nor is it a sum remaining due and unpaid upon any share of stock subscribed in said corporation; in the sense in which those terms are used in that section.

I am aware that the sixth district has held, in *Hyde* v. *Beardsley*, a case not reported, "that a receiver of a mutual insurance company was entitled to collect the whole amount of the premium notes without assessment, under and by virtue of the power and authority conferred upon him by section 69; and if the debts of the company were not sufficient to require the whole to be paid in, the surplus might be refunded." This case is referred to in 12 *Barb.* 671. But if that decision extends so far as to include within it those notes by me denominated "premium notes," it must be disregarded. The application of such a principle to that class of notes would violate the express letter of the contract, defeat the intention of the parties, and subvert the spirit of the act itself. Although it be conceded that "premium notes" constitute capital, and that the insured are members of the company; yet, such notes are not shares of stock, nor due for shares of stock; nor are the insured stockholders, in the legal or legitimate sense in which that term is used or understood.

The system to be deduced from the several enactments is this: An insurance company, organized under the act of 1849, is, by virtue of the statute of 1853, made subject to its provisions; and "premium notes" received after that act took effect are to be made to contribute towards the payment of losses and expenses as therein provided. Before insolvency, assessment by the directors is a pre-requisite. After insolvency, a receiver appointed under section 39, 2 *R. S.* 463, takes charge of the property and effects of the company; its "deposit notes" are assets in his hands; the "premium notes" are not due, but only to become due, when the extent of their liability is determined by assessment; and before action is brought, notice

must be given of the assessment, and personal demand made. Such assessment may be made by the receiver. (*Laws of* 1852, *p.* 67.)

It follows, from these conclusions, that no action can be sustained upon a "premium note" given, since the act of 1853 took effect, to any mutual insurance company, except it be to pay for losses or expenses actually accrued while such note was in force, and after assessment. Assessment, or apportionment, is a condition precedent, necessary to be averred in the complaint and proved on the trial. The complaint contains no such averment, and for that reason it is insufficient.

The order of court averred in the complaint, even if sufficiently set forth, would not aid the plaintiff. It merely directs the receiver to "prosecute and collect the whole amount unpaid on the deposit and premium notes by any and all legal and proper ways and means," &c. As I have shown, the "amount unpaid" on this note can only be determined by assessment, and unless that be done, its prosecution would not be legal or proper.

The order of the special term is affirmed.

[Clinton General Term, May 5, 1857. *James, Gould* and *Rosekrans* Justices.]

INDEX.

A

ABSCONDING HUSBANDS AND FATHERS.

1. Where a warrant is issued by two justices of the peace, upon the application of the overseers of the poor, for the seizure of the property of an absconding husband and father, under the 8th section of the title of the revised statutes relative to the relief and support of indigent persons, and such property is seized thereon, and an inventory returned to the court of general sessions, that court has no authority to confirm such warrant and seizure without an inquiry into the facts and circumstances of the case. *The People ex rel. Read* v. *Overseers of the Poor of Triangle*, 236

2. It is not sufficient that the court is satisfied that a warrant has been issued by two justices, and that the overseers have seized the property and made an inventory thereof, and returned it to the court. An inquiry into the merits of the case was intended, by the legislature. *ib*

3. The court should require the overseers to produce some evidence to establish the case charged in the warrant, against the party whose property is seized, and the case may be contested by such party. *ib.*

ACKNOWLEDGMENT.

Of written instruments.

See EVIDENCE, 1, 2, 3, 4.

ACTION.

1. Darkening another's windows, or depriving him of a prospect, by building on one's own land, where no right to the light unobstructed has been acquired by grant or prescription; digging by a person on his own soil, so as to endanger the foundation of the building of the adjoining owner, and numerous similar acts by an owner of land, impairing the enjoyment and value of the land of another, short of what the law deems a nuisance, invade no legal right, and hence are not legal injuries. *Pickard* v. *Collins*, 444

2. In an action to recover damages of the defendant, for erecting a high fence upon his premises immediately adjoining the plaintiff's dwelling house, and before his windows and doors, it is erroneous to charge the jury that the defendant had not a right to build a fence on his own land, for the purpose of excluding the light from the plaintiff's dwelling, and that if he has done so, and it has had that effect, he is responsible in damages for the injury. *ib*

3. The liability of the defendant, in such a case, ought not to be made to depend upon the *motives* with which the erection was made. *ib*

4. Bad motives, in doing an act which violates no legal right of another, cannot make the act a ground of action. *ib*

See ACCOUNT, 3.
AGREEMENT, 1, 4.

ACCORD.

An accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for a breach of it. *Billings* v. *Vanderbeck*, 546

ACCOUNT.

1. Where mutual dealings had taken place between the plaintiffs and the defendant, and the plaintiffs delivered to the defendant a statement of the accounts between them, showing a balance of $842.09 due to the former; and the defendant took the account away with him, to see if it was correct, and kept the same several months; writing to the plaintiffs, from time to time, that he intended to make good the balance of account against him; that the account should be examined and the balance paid; that he had no objection to sending his notes for the balance, but not at thirty or sixty days; admitting that his obligation to pay the amount was no less, as the matter then stood, than if the plaintiffs had his notes; and promising that if they desired it he would send his due bill *for the amount*; saying, at another time, that he could not pay the plaintiffs the balance they claimed against him, just then, but that he should pay what he owed them at the earliest date possible, &c.; but in none of these letters was any fault found with the plaintiffs' account, or any complaint that the balance claimed was too large; *it was held* that these letters, taken together, constituted a strong admission of the accuracy of the account; and that the same became a *settled account*, and the balance was admitted to be due. *Powell* v. *Noye*, 184

2. *Held also*, that it was no objection to the account that a part of it consisted of what was due on certain joint transactions between the parties. *ib*

3. When a balance is struck, and admitted to be due, on partnership transactions, it may be recovered, in an action at law. *ib*

ADMISSIONS AND DECLARATIONS.

1. Where a plaintiff is examined as a witness for the defendant, his testimony, given on the trial of a former action, between himself and another person, which was directly contrary to what he testifies to in the second suit, may be given in evidence, as an admission. *Pickard* v. *Collins*, 444

2. The defendant has a right to prove the former testimony, as an admission, by any competent witness, other than the plaintiff. He may also prove it by the plaintiff himself, unless the latter objects on the ground that he is privileged from answering. *ib*

3. Where an act of a party is admissible in evidence, his declarations at the time, explanatory of that act, are also admissible as a part of the *res gestæ*. *Wilcox* v. *Green*, 639

ADVERSE POSSESSION.

1. In an action to recover damages for the flowing of lands by means of a mill dam, the defendant proved that his dam had been erected upwards of twenty years, and that he, and those under whom he claimed, had been in the actual possession of the dam, &c. for upwards of twenty years, for the purpose of supplying grist mills, and that the dam had been kept up at its present height. *Held*, that this evidence, in the absence of any proof by the plaintiff, to rebut it by showing that the defendant's occupation, and setting back of the water, was by leave or license or without claim of right, was sufficient to authorize the jury to imply a grant of the easement, from some person authorized to make it, and to justify a verdict for the defendant. *Hammond* v. *Zehner*, 473

2. The burden of proving an adverse possession is on the party claiming the easement. But the use of an easement for 20 years, unexplained, will be presumed to be under a claim or assertion of right, and adverse, and not by leave or favor of the owner. *ib*

AGREEMENT.

t. Validity and legality.

1. The law will never lend its aid to either of the parties to a fraud, to enforce an executory contract, nor to rescind or disturb one which has been executed, if founded in immorality or upon transactions forbidden by law. The maxim in such cases is, *in pari delicto potior est conditio defendentis. Westfall* v. *Jones*, 9

2. An agreement, between attorney and client, by which the former is to receive a specified sum to begin with, and the taxable costs and a certain per centage upon the amount recovered of the defendant in an action to be commenced, without any understanding that the suit shall be carried on or maintained *at his own expense*, does not amount to *champerty*, and is not void nor illegal. *Benedict* v. *Stuart*, 420

3. The provisions of § 103 of the code are sufficiently broad and comprehensive to include and legalize such a transaction, assuming that it would, under any previous statute or statutes, have been unlawful. *ib*

4. An agreement, by which A. promises to deliver to B. certain property mentioned therein, at a specified time and place, and B. agrees to accept the property at the time and place specified and deliver certain promissory notes of A. to him, is valid; the mutual stipulations constituting a sufficient consideration. And if A. tenders performance, on his part, at the day and place, and B. fails to accept, or to perform on his part, a cause of action arises in favor of A. for such damages as he has sustained by B.'s breach of contract. *Billings* v. *Vanderbeck*, 546

5. It being the policy of the law to protect the rights of individuals in respect to their own inventions, labels and devices, and the legislature having passed an act to punish and prevent fraud in the use of false stamps and labels, it seems to be implied that individuals shall not themselves attempt, or allow, any imposition upon the public by the false and fraudulent use of such labels, devices, &c. *Bloss* v. *Bloomer*, 604

6. Accordingly *held*, that it was an offense against the spirit of the law, equally injurious to trade and commerce, and equally an imposition upon the public, to palm off spurious goods under cover of genuine labels and devices. And that contracts to do this were clearly against public policy, and should not be upheld and enforced by the courts. *ib*

7. A contract for the sale and purchase of a quantity of empty papers or bags for seeds, with the plaintiffs' labels thereon, to be filled with seeds by the purchaser, and the seeds thus put up to be offered for sale by the purchaser of such papers, in a specified county, and not elsewhere, was therefore held to be void. *ib*

8. The plaintiff, having a lien upon a boat belonging to H., for repairs, amounting to $124.61, and refusing to give up the possession of the boat until the amount of his bill was paid, the defendant promised the plaintiff verbally, that if he would deliver the boat to H. he, the defendant, would pay to the plaintiff the amount due to him for repairs, in manner following, viz: $50 in hand and the balance in two equal installments, at future periods. The boat was accordingly delivered to H. and the defendant paid the $50 in hand. In an action for the balance of the plaintiff's bill; *Held* that the agreement, being an undertaking to answer for the debt of another, and not being in writing, was void by the statute of frauds. *Mallory* v. *Gillett*, 610

9. By a written contract, made on the 14th of May, 1847, between the plaintiff and the defendants, the former agreed to sell to the latter, all the mint oil which should be produced upon twenty-three acres of peppermint then growing, which should include and cover all the oil of peppermint the plaintiff should raise, grow or distill, or in any way produce or be interested in the production of, for two years from the date of the contract, and the defendants agreed to take and pay for the same, at a specified price per pound. And the plaintiff agreed to discontinue his interest in the production of peppermint oil (with the above exception) until the first of March, 1849; that he would not sell, give or barter

away any peppermint roots to any person whatever, until that time; that he would not distill for any other person, excepting for those who should have contracted their oil of peppermint to the defendants; nor sell, rent or give away his distillery, or the use of it, for two years; and that no peppermint roots, except two acres, &c. should be grown, or oil distilled, on his land, until the 1st of March, 1849, excepting for the production of the oil of peppermint called for by said contract. It was further stipulated that the agreement should be null and void in case the growers did not generally enter into an agreement with the defendants by the first day of June, &c. In an action against the defendants, for a breach of this contract, in refusing to receive and pay for the oil of peppermint raised by the plaintiff, on his land; *Held*, that the agreement was not illegal and void as being in restraint of trade, or against public policy; or under the statute against conspiracies to restrain trade; or as being part of a scheme for monopolizing the trade in peppermint oil; but that the same was valid, and capable of being enforced. *Van Marter* v. *Babcock*, 633

2. *Construction and effect.*

10. Where a party agrees to work for another for a month, and, if the parties are suited with each other, that he will work during the season, or six or seven months, he is bound to determine, and make his election, at the end of the month, whether to quit, or stay during the season. *Peters* v. *Whitney*, 24

11. If he continues to work after the expiration of the month, this is presumptive evidence that he has determined to stay through the season; and he cannot afterwards leave the employer's service before the end of the season, except for a cause that would be a justification for abandoning or rescinding the contract. *ib*

12. It is a familiar principle that where, in an instrument between parties contracting with each other, a reference is made to another which contains conditions and qualifications in regard to the subject matter about which they are contracting, the latter shall be deemed incorporated with the former, and be taken as a part of the contract between the parties. *Hunt* v. *The City of Utica*, 390

13. A reference to the provisions of a statute pertaining to, and regulating, the subject, in respect to which a party is about to contract, comes within the same principle. It is as if the law were written in, and formed an integral part of, the contract which the parties have undertaken to enter into. It interprets its provisions, and is equally binding upon both. *ib*

14. Thus, where the corporation of Utica commenced proceedings for the grading of a street, under the 66th section of its charter, and published the notice of application and a plan and specifications of the work, stating therein that "the expense thereof was to be assessed pursuant to the 66th section of the city charter," &c.; and in the proposal which the contractor made he offered to do the work upon certain specified terms, "according to plans and specifications thereof, on file with the city clerk;" and in accepting the proposal the common council stated that the expenses "are to be assessed pursuant to the 66th section of the charter," and again, in finally auditing and allowing the contractor's account, they added that it was "payable when collected by assessment;" *Held* that these proceedings and documents constituted the contract between the parties, and that no action would lie against the corporation, in favor of the contractor, until the assessment had been collected; it being shown that the corporation had done its duty in making an assessment, and in taking the necessary measures for its collection. *ib*

15. In an action upon a parol agreement between the plaintiff and defendant, by which the former promised to transfer to the latter a farm, and the defendant in exchange therefor, was to pay to the plaintiff a sum of money, and transfer to him an obligation to be given by C. to the defendant for the purchase money of real estate, for a specified sum, it is not erroneous for the judge to charge the jury that if the contract between the parties was that the plaintiff was to take the obligation which C. was to give to the defendant, then it became the

duty of the defendant, as a part of the contract, to procure the obligation, and deliver it in payment; and that, not having done so, he had failed to perform, on his part, and the action might be maintained, to recover the amount of the obligation. *Thomas* v. *Dickinson*, 431

16. The construction of the contract belonged to the court, and its legal effect was correctly stated in the charge. *ib*

17. The agreement by the defendant, to turn out the obligation of C., necessarily involved an undertaking by him to procure it. *ib*

18. The contract between the parties, being made on the assumption that the obligation would be given by C., the law cast upon the defendant the risk of a default by C. *ib*

19. A provision, in an agreement to pay money for the erection of a church, that the slips shall be sold at auction, to the highest bidder, upon the completion of the house, and that moneys subscribed may be applied in payment of bids, is not inoperative, so as to render subscriptions void. Such a provision for a sale is to be construed as meaning such a sale as the trustees are authorized by law to make, viz. a demise and lease of the slips. ***Methodist Episcopal Union Church*** v. *Picket* 436

3. *Damages on breach of.*

20. In an action for the breach of a contract for work and labor to be done upon a farm, evidence of damage occurring to the plaintiff's crops in consequence of the defendant's leaving his service is inadmissible. *Peters* v. *Whitney*, 24

21. The legal measure of damages, in such cases, is the difference between the wages agreed to be paid to the defendant, and the price the plaintiff was obliged to pay for labor to supply his place. *ib*

22. A parol agreement was made between the plaintiff and defendant, by which the former promised to transfer to the latter a farm, and the defendant, in exchange therefor, was to pay to the plaintiff a sum of money and transfer to him an obligation to be given by C. to the defendant, for a specified amount. The defendant having failed to perform that part of the agreement relating to the obligation of C., in consequence of the refusal of C. to give the obligation; *Held* that the rule of damages was the value of the debt or obligation which was agreed to be transferred to the plaintiff; and that the value of that debt or obligation was *prima facie* the amount of it. *Thomas* v. *Dickinson*, 431

23. On the breach of an agreement for the sale and delivery of property at a specified time and place, the rule of damages is the difference between the contract and the market price of the property at the time fixed for delivery. If there is no evidence as to the value of the property, the plaintiff can recover only nominal damages. *Billings* v. *Vanderbeck*, 546

ALBANY (CITY OF.)

1. The corporation of Albany being, by the act of April 5, 1828, authorized and empowered to collect the wharfage on the piers and docks, and distribute it among the pier and dock owners, are the trustees of an express trust, and as such they may maintain an action for wharfage, without joining with them the *cestuis que trust*. *Corning* v. *Greene*, 33

ALBANY PIER.

1. The statutes of 1849 and 1851, authorizing joint stock and other companies and associations of seven or more persons to sue or be sued in the name of their president or treasurer, conferred upon those officers no right to sue, except in cases where the shareholders or associates could before have prosecuted. *Corning* v. *Greene*, 33

2. The intent of those statutes was to obviate the inconvenience of joining all the shareholders or associates as parties; to facilitate an existing right of action, and not to create a new one. *ib*

3 The president of the proprietors of the Albany Pier, by virtue of those statutes, can only bring such actions as the pier owners could have maintained before; and prior to the passage of those acts, and under the act of April 5, 1823, the pier owners could not sue the owners of vessels entering the basin, for wharfage. *ib*

4. The corporation of Albany, being by the act of April 5, 1823, authorized and empowered to collect the wharfage on the piers and docks and distribute it among the pier and dock owners, are the trustees of an express trust, and as such they may maintain an action for wharfage, without joining with them the *cestuis que trust.* *ib*

5. The proprietors of the pier, if *as an association* they were really and exclusively interested in a claim for wharfage, might, since the code, also sustain an action for the recovery thereof. *ib*

6. But inasmuch as each pier owner is a distributee of the sums collected by the corporation for wharfage, and receives and holds his share, not in common but separately, and the association is not jointly or in common either entitled to, or interested in, the subject matter, an action will not lie in the name of the president of the pier association, to recover an entire moiety of the wharfage. *ib*

See STATUTES, 5, 6, 7, 8.

ALTERATION OF INSTRUMENTS.

Where the payee of a note, before its maturity, transferred it to another, and for the purpose of giving his own personal security to the purchaser, upon the note, and without any fraudulent intent, wrote his own name under the names of the makers, adding thereto the word "security;" *Held* that this was a material *alteration*, which vitiated the instrument. *Chappell* v. *Spencer*, 584

AMENDMENT.

See JURISDICTION, 9

ARBITRATION AND AWARD.

1. Where a submission to arbitration recited that a controversy existed, in relation to the settlement of the accounts between the parties, and *the claims of each upon the other*, and the parties submitted "the said controversy and claims" to arbitrators; *Held* that this embraced claims for damages sustained in consequence of an alleged wrongful dispossession of a party from demised premises, and the tortious conversion of personal property; where it appeared that those claims, as well as claims upon the accounts between the parties, grew out of a written agreement respecting the occupation of a grapery and greenhouses, and the cultivation of the plants, &c. therein. *Owen* v. *Boerum*, 187

2. Where there was no proof that an award was not made within the time fixed by the submission, except that it bore date the day after the time fixed, and that it was not delivered until the day it was dated; *Held* that this was not sufficient to show that the award was not ready on the day appointed; it not appearing that it had been called for before it was delivered. *ib*

3. Until the contrary affirmatively appears, it will be presumed that the arbitrators performed their duty, and had the award ready within the time fixed. The mere date at the end of the paper, is not enough to establish the contrary. *ib*

4. An award which leaves nothing to be done, to dispose of the whole matter in controversy, except mere ministerial acts, is sufficiently certain and final. *ib*

5. An award need not be under seal, unless the submission requires it to be so. The mere fact that the submission is under seal, does not make it necessary to affix seals to the award. *ib*

6. Nothing which does not appear upon the face of an award can be pleaded or proved against it, in an action at law. *ib*

7. Not even fraud or corruption can be set up against an award. The party averring it must bring his suit, or in some proper way assert his claim to have the award set aside. *ib*

8. Where parties submit to arbitration all their demands against each other, it is no objection to the validity of the award, that any particular subject thus submitted was not laid before the arbitrators. Nor will the omission to lay such subject before the arbitrators prevent the award from being a bar to a suit brought to recover the amount of the omitted item. *ib*

See RELIGIOUS SOCIETIES, 7, 8, 9, 10.

ASSAULT AND BATTERY.

1 In an action for an assault and battery it appeared on the trial that, in November, 1852, the plaintiff's arm was considerably injured, and she claimed that the injury was caused by the defendant violently seizing her arm and wrenching it. There was no direct and positive evidence that the injury was occasioned by the defendant. Two witnesses, T. and J., testified that shortly after the plaintiff's arm was injured, they heard her charge the defendant with having injured it, and that they did not hear the defendant deny the charge. W. and S. gave evidence tending to show that about an hour before this the plaintiff made substantially the same charge, which the defendant denied. The evidence was such that the jury would have been justified in finding that there was an interval of an hour between the two conversations, and that they took place on different occasions. The judge instructed the jury that if the plaintiff charged the defendant with having committed the assault, and the latter at the same time denied it, then it furnished no evidence against him; but if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they might think it entitled to. That they would not, probably, conclude that the defendant, after he had once emphatically denied the accusation, on that occasion, was called upon to deny it again if the accusation was repeated. He however left it to the jury to give such weight to the defendant's silence, when the charge was repeated, as they thought it entitled to, under the rules which had been stated by him, as to the effect of remaining silent. *Held*, that the charge was not erroneous; and a verdict in favor of the plaintiff was sustained. *Jewett* v. *Banning*, 14

2. *Held, also*, that although the charge made by the plaintiff against the defendant furnished no evidence of the guilt of the latter, provided it was promptly denied at the time. such denial was not an absolute shield to the defendant for all subsequent occasions when the charge should be repeated. *ib*

3. In such a case the effect of the defendant's conduct, when the charge is repeated, is a proper subject for the consideration of the jury, as a circumstance of more or less weight, depending among other things, upon the length of the interval between the denial of the charge and a subsequent time when the defendant remained silent under the charge. *ib*

ASSESSMENT.

See AGREEMENT 14.
BROOKLYN, CITY OF.
BUFFALO, CITY OF.
INSURANCE.

ASSIGNMENT.

1. Where a debt is assigned, the assignment carries with it all the collateral securities held by the assignor, for its collection, although they are not mentioned or referred to in the assignment; upon the ground that in such cases the securities are incidents to the debt, which is the principal. *Parmelee* v. *Dann*, 451

2. Upon the same principle, where the defendant, by his agreements with M. and S. by which he let land to them to plant on shares, was bound to keep the fences in repair, *it was held* that assignees in law, of the interests of M. and S. in the crop, under such agreements, acquired,

by the assignments, as an incident thereof, the right to prosecute the defendant for not fencing according to his contracts, and to claim damages for injuries done by the animals of the defendant and others, to the crops while growing, in consequence of the non-repair of the fences. *ib*

See DEBTOR AND CREDITOR.
INSURANCE, 7, 8, 9.

ASSOCIATIONS.

1 It is only in cases where an association, as such, are the owners, or have an interest, joint or in common, in any property, right of action or demand, that a suit may be maintained in the name of the association. *Corning* v. *Greene*, 33

2. The separate owners of demands, or of separate rights of action, cannot voluntarily associate, and elect a president, and, under the acts of 1849 and 1851, recover in the name of such president, in one suit, the separate demands. *ib*

3. Under a power given to the directors of an association "to appoint a secretary and such surveyors and other assistants as may be necessary," they can appoint an agent, who may sign contracts, on such terms as shall be previously authorized by them.—*Wright* v. *Delafield*, 498

See ALBANY PIER.

ATTORNEY.

See AGREEMENT, 2, 3.

AUTHORITY.

1. The rule that when an authority is to be exercised by several officers, they must all concur in its exercise, or all meet and consult and a majority agree to the act, is subject to the qualification that if one is notified to attend, and refuses, it is the same as if he had attended and dissented to the act of the majority. *Horton* v. *Garrison*, 176

2. When a private authority is conferred, on several, all must be present, and all must concur, unless provision be otherwise made. *The People ex rel Hawes* v. *Walker*, 304

3. When a public authority is conferred on individuals (not on a court) who are to act judicially, all must confer together, but a majority may decide. *ib*

4. In public cases not of a judicial character, a majority make a quorum, if a majority may decide. *ib*

5. Where a statute required that a commissioner of jurors, for the city and county of New York, should be appointed by the supervisors of said city, the judges of the superior court, and the judges of the court of common pleas, without saying any thing as to the number which should constitute a quorum, or whether a majority either of the whole body, or of the component parts, should be sufficient to appoint; *it was held*, that after due notice to all the persons mentioned, a majority of the whole number constituted a quorum, and were competent to decide any matter on which the whole body had authority to act; and that they therefore had the power to remove an individual from the office, and appoint another in his place. *ib*

6. *Held also*, that it was not essential to the validity of the appointment that all the judges of both the superior court and the common pleas, or a majority of each, should be present at the election. *ib*

B

BILLS OF EXCHANGE, AND PROMISSORY NOTES

1. Where, in an action upon a promissory note, against the maker and indorser, the indorser sets up the defense that the note was indorsed by him for a particular purpose, and no other, for the accommodation of the maker, and there has been a diversion of the note to a different purpose; and the answer alleges that when the plaintiff received the

note he had notice of the object and purpose of the indorsement, this constitutes *prima facie* a good defense to the indorser; and it is not necessary for him to allege, in his answer, that he has been *injured* by the diversion. It is incumbent upon the plaintiff to show that the indorser has *not* been injured.—*Rochester* v. *Taylor*, 18

2. Where the payee of a promissory note, a short time before her death, and while sick, delivered the note to her sister, with directions to her to hand it to the maker, in payment or on account of, his claims for boarding the payee and furnishing her with medicines; *Held* that this was a valid cancellation of the note. *Edwards* v. *Campbell*, 423

3. *Held also*, that an action could not be maintained upon such note, by a third person, after the payee's death, without showing a title thereto, derived from the personal representatives of the payee. *ib*

4. Where goods are sold by A. to B. on the credit of C., and C with full knowledge of that fact and intending to become surety for B. (on the purchase, indorses the note made by B. to A., such indorsement, read in connection with the note, is a written contract "for value received," binding the indorser to pay in case the maker does not; provided a demand of the maker be first duly made, and notice of protest duly given to the indorser. DAVIES, J., dissented. *Moore* v. *Cross*, 534

5. The payee in such a case, if strict form is insisted on, has a right to indorse his name on the back of the paper, "without recourse,' and then to bring a suit thereon, not as payee, but as holder; especially if he sets forth in his complaint, and proves, all the facts which show that such was the understanding of the parties, and that the merchandise was delivered upon the faith of it. *ib*

6. Such an instrument, both in fact and in legal effect, is at once a written receipt for the goods under the name of "value," and a written promise on the part of the maker and indorser to pay for such value; the former absolutely, and the latter conditionally. *ib*

BOND.

The condition of a bond given to the plaintiff by the defendant, was that the obligor should from time to time and at all times during the life of the obligee, well and sufficiently maintain and keep the obligee, *in the house of him, the obligor*, with meat, drink, clothes and all other things necessary and convenient. The plaintiff, after having left the defendant's house, and sought another home, brought an action upon the bond. *Held*, that the defendant was not bound to clothe or board the plaintiff, any where except in his own house; that upon the plaintiff's living with him depended her right to require the defendant to board and clothe her. And it not appearing that the plaintiff had sufficient cause for leaving the defendant's house and living elsewhere, it was *further held* the action would not lie. *Hawley* v. *Morton*, 255

See COMPLAINT, 6, 7.
EVIDENCE, 1.

BROOKLYN (CITY OF.)

1. Under the section of the charter of the city of Brooklyn, which provides that the expenses in the construction of sewers shall be assessed and be a lien upon the property to be benefited thereby, in proportion to the amount of the benefit, the jurisdiction conferred is limited to the property to be benefited. When it becomes a question of fact whether a proposed improvement will be advantageous to the property in any designated direction, the decision of the corporate authorities is conclusive. *The People ex rel. Marvin* v. *The City of Brooklyn*, 166

2. But there must be a question—something to decide—where the district is not clearly included. If it is entirely clear that any portion of a proposed district cannot be benefited, an attempt to render the property in it liable to pay a part of the expenses, may be defeated, if not before the corporate authorities, certainly before a judicial tribunal having the power to annul or correct the proceeding. *ib*

8. Where a portion of the property assessed for the construction of a sewer is so situated that it will not be benefited by the sewer, and there is no connection by sewer between such property and the projected sewer, and there cannot be any, by reason of the existence of a rail road tunnel in one of the intervening streets, such property is beyond the limits of rightful assessment, and its owners cannot be called upon to contribute towards the improvement. *ib*

4. Under the former charter of the city of Brooklyn, passed in 1834, the common council had no power to assess adjoining lots for flagging side walks. In June and April, 1850, the common council passed an ordinance, requiring the side walks on Tillary street to be flagged by the owners. Some of the owners of property upon the street failed to comply. In July and September, ordinances were passed, directing the work to be done by the city authorities, and that the expense should be a lien on the lots. The work was completed previous to the 1st of January, 1851. In 1851 the common council caused an assessment to be made, for this work, by the street commissioners, all the proceedings for which were in conformity with the new city charter, passed in 1850, but which did not go into effect until the 1st of January, 1851. *Held* that the work having been directed and completed while the charter of 1834 was in force, the payment or collection of the consequent expenses must be according to its provisions, and that the common council had no power to make, or collect, an assessment, under the provisions of the new charter, for the expenses of the improvement. *The People ex rel. Johnson* v. *The City of Brooklyn*, 180

BUFFALO (CITY OF.)

1. The act of July 21, 1853, amending the section of the revised statutes relating to the assessment and collection of taxes against moneyed or stock corporations, and to the method by which such corporations may be relieved from the payment of any tax, did not affect the charter of the city of Buffalo or change the rule prescribed therein for the guidance of the board of assessors, in such cases. *American Transportation Co.* v. *City of Buffalo*, 272

2. Hence, if the board of assessors of that city is satisfied that a corporation has, during the previous year, been in the receipt of *any profit or income*, it is not obliged to strike the name of such corporation from the assessment roll, although its *net* annual profits, or clear income, have not been equal to *five per cent* on its capital stock. *ib*

C

CASES OVERRULED.

1. The cases of *Jackson* v. *De Witt*, (6 *Cowen*, 316,) and *Cunningham* v. *Knight*, (1 *Barb S. C. Rep.* 399,) so far as they deny the right of a widow to redeem her dower from a mortgage given for the purchase money, either entirely outstanding or foreclosed in a suit to which she was not a party, overruled. *Mills* v. *Van Voorhis*, 125

2. *Lawrence* v. *Wright*, (2 *Duer*, 673,) overruled. *Walter* v. *Lockwood*, 228

CERTIORARI.

See SCHUYLER COUNTY, 6, 7, 8.

CHAMPERTY.

See AGREEMENT, 2.

COMPLAINT.

1. An averment, in a complaint, that a meeting was *duly convened* implies that it was *regularly* convened, and, if necessary to its regularity, that it was an adjourned meeting. *The People ex rel. Hawes* v. *Walker*, 304

2. In averring performance of a condition precedent to a right of action upon a bond, it is not sufficient for a complaint to allege that the parties

who were to do so, "did execute a release of all actions," &c. without stating whether it was by an instrument under seal, or in what manner, so as to enable the court to judge whether it was a valid release. *Hatch* v. *Peet*, 575

3. So, also, an allegation as to the discontinuance of suits, that all suits, &c. "were discontinued, each party paying his own costs, as in the condition of said bond stipulated," without stating what was done for the purpose of a discontinuance, so that the court may see that the object was effected, is insufficient. *ib*

4. The rules respecting the mode of setting forth the performance of conditions precedent, were not intended to be substantially changed by the code. *ib*

5. Facts showing performance, are to be stated; not circumstances which are mere evidence; nor mere legal conclusions. *ib*

6. Where one of the conditions precedent in a bond was that "all suits in the supreme court, and in the county court of Monroe county are to be discontinued, each party paying his own costs; meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court, one against *Norman Peet*, one against Nelson Peet, and one against Silas Dunham and others; and five suits in the county court, three in the name of Polly M. Hatch, and two in the name of Elmore A. Hatch," and the allegation of performance, in the complaint, was that "all suits in the supreme court, and in the county court of Monroe county, were discontinued, each party paying his own costs, as in the condition of said bond stipulated, meaning three ejectment suits in the name of Polly M. Hatch, in the supreme court, against Nelson Peet, and one against Silas Dunham and others; and five suits in the county court, three in the name of Polly M. Hatch, and two in the name of Elmore A. Hatch;" nothing being said in the latter allegation, about the suit against *Norman Peet*, mentioned in the bond, and it not appearing in any way to have been discontinued; *it was held*, on demurrer, that the complaint was bad for not showing performance of the stipulation as to that suit; the general averment that all suits, &c. were discontinued, being expressly limited, by what followed, to the suits particularly specified. *ib*

7. *Held also*, that the latter clause of the sentence explained and restricted the former part; and that although unnecessary, yet having been made, and the general allegation qualified by it, it could not be rejected as surplusage. *ib*

8. Where a complaint alleged that W. J. S. died seised of real estate, leaving no child capable of inheriting, and that the land thereupon descended to F. S. *as sole heir at law*, &c.: *Held*, that this must be regarded as equivalent to an allegation that F. S. was W. J. S.'s heir and only heir at law. *St. John* v. *Northrup*, 25

9. Less strictness should be observed in considering objections to a complaint, after the defendant has answered upon the merits, and waits until the trial to raise them, than if the questions were presented by demurrer to the complaint. *ib*

10. It is only such defects in the complaint as are incurable, that a defendant can take advantage of on the trial. *ib*

See EJECTMENT.

COMMISSIONER OF JURORS.

See AUTHORITY, 5, 6.

COMMON SCHOOLS.

1. The trustees of a school district are a *quasi* corporation, possessing power in certain cases, and for certain purposes, to bind their district and create a corporate liability which will attach to their successors in their official capacity. *Horton* v. *Garrison*, 176

2. They therefore have the power to bind the district, by giving a promissory note signed by them as trustees, to a teacher, for wages earned by him as such, in the employment of the district. *ib*

3. And where a note thus made, expresses on its face that it is given on account of the wages of the payee, as teacher in the school district of which the makers of the note are trustees, this is a description of the consideration, which the payee, by accepting the note, admits to be true. The makers, therefore, cannot be held personally liable upon the note. *ib*

CONSTABLE.

See REPLEVIN, 2.

CONSTITUTIONAL LAW.

1. So much of the code of procedure as confers upon county courts jurisdiction of suits for the foreclosure of mortgages, is unconstitutional and void. BROWN, P. J. dissented. *Hall* v. *Nelson*, 88

2. At the time of the adoption of the present constitution, actions to foreclose mortgages and sell the mortgaged premises, formed an ordinary class of cases, in equity, and cannot be considered as "special," within the true meaning of that instrument, where it declares that county courts shall have no original civil jurisdiction except in such *special cases* as the legislature may provide. *ib*

3. The act of April 12, 1853, amending the charter of the city of New York, so far at least as it seeks to make applicable to the board of supervisors sections 12 and 15 of that act, was as passed, unconstitutional and void, for the reason that the power was delegated to the people of the city of New York to say whether or not it should be a law of the state. *The People ex rel. McSpedon* v. *Stout*, 349

4. But by the 4th section of the act of June 14, 1853, supplementary to the act of April 12, 1853, which section declares that the supplementary act, and the acts to which it is supplementary, "shall commence and take effect as laws immediately," the legislature expressed its will that the act of April 12 should immediately become, and take effect as, a law. And the act of April 12 was re enacted by the act of June 14; and the constitutional objection to the former, on the ground that it was dependant upon the will of the electors whether or not it should become a law, was therefore obviated. *ib*

See STATUTES, 1 to 6.

CORPORATION.

1. The section of the revised statutes, authorizing the property of an insolvent corporation to be sequestrated, and a receiver to be appointed, contains a special delegation of power over such corporations, to be exercised in a prescribed manner, and upon a particular state of facts; and like all cases of authority delegated by statute, affecting liberty or property, the prescribed form for obtaining jurisdiction of the person and the subject matter must be strictly pursued. *Bangs* v. *McIntosh*, 591

2. The proceeding is not a continuation of the original suit, but is an original proceeding in the supreme court, as a court of equity, in which the presentation of the petition is the first step, and is the act which confers jurisdiction. *ib*

3. Before the court can lawfully order the sequestration and appoint a receiver, it must have a petition from the *creditor in the judgment*, or his legal representatives, setting forth the due recovery of a judgment in a court of law, or a decree in equity, with the due return of an execution thereon issued, unsatisfied, in whole or in part. This is essential to confer upon the court the slightest power or authority to proceed in the case. *ib*

4. A petition signed by, and in the name of *the attorney* for the judgment creditor, is not sufficient to confer jurisdiction; and an order made thereon, for the sequestration of the property of a corporation, and the appointment of a receiver, will be unauthorized and void. *ib*

5. An order subsequently made by a judge at special term, granting leave

to amend such petition, and an amendment in pursuance thereof, will not cure the defect, but will be merely adding another nullity to the prior nullity. *ib*

See BUFFALO, CITY OF.

COUNTY COURT.

See CONSTITUTIONAL LAW, 2.

COURT OF GENERAL SESSIONS.

See ABSCONDING HUSBANDS, &c.

COVENANT.

1. B. & M. being the owners of a tract of land in the city of Brooklyn, sold and conveyed two lots to S. The deed was executed by the grantee, as well as by the grantors, and contained a covenant that neither S. nor his heirs or assigns, would establish or carry on, upon the premises conveyed, any manufactory, trade, business or calling which might be "in any wise dangerous or noxious or offensive to the neighboring inhabitants." B. & M. had previously conveyed to O. B., one of the plaintiffs, other lots in the vicinity of those so conveyed to S., and in the same tract. J. B., another of the plaintiffs, was the owner of a part of the premises retained by B. & M. at the time of their conveyance to S. and subsequently conveyed by them to the person under whom J. B. derived his title. And P., the other plaintiff, claimed under the deed to S. J., the defendant, being in the possession of the said two lots so conveyed to S., claiming as owner, under a title derived from S., established, and was carrying on, a business which was alleged to be among those embraced in the covenant, and to be dangerous, noxious and offensive to the plaintiffs and other neighboring inhabitants. *Held* that although the plaintiff, O. B., being a previous purchaser, could not sue at law upon the covenant in the deed from B. & M. to S., he not being the assignee of that covenant, yet that the covenant was intended not only for the benefit of B. & M., but also for that of all their prior as well as subsequent grantees, and created an *easement* in behalf of the whole property; and that a court of equity might interpose, by injunction, in behalf of any of the owners of the lots, as being parties for whose benefit the covenant was made. *Brouwer* v. *Jones*, 153

2. *Held also*, that the fact that P., one of the plaintiffs, deduced his title through S., the defendant's grantor and the original grantee and covenantor, was wholly immaterial; title to lands within the tract for the common benefit of which the easement was created, being the only requisite to support an action to restrain a violation of the covenant by any proprietor. S. B. STRONG, J., dissented. *ib*

3. A life estate in a portion of the tract, obtained by the purchase of a dower interest, is sufficient to sustain such an action. *ib*

4. An owner of any estate, as well as an occupant of the dominant tenement, in such a case, may invoke the aid of a court of equity to enforce the easement in the servient tenement. *ib*

5. The covenant in the deed to S. constituted a right in the grantors and those who might claim, under them, any part of the entire tract then held by them, upon the land conveyed, whether in the hands of S. or his heirs or assigns. And the nature of the covenant clearly evinced that it was designed to run with the land, and not to create and continue a mere personal obligation. In such cases it is well settled that the covenant may be enforced by and against those who may subsequently become part owners. *Per* S. B. STRONG, J. *ib*

D

DAMAGES.

See AGREEMENT, 20 to 23.
REPLEVIN, 3.

DEBTOR AND CREDITOR.

1. An assignment, executed by debtors residing in this state, for the benefit of their creditors, although it relates to, and embraces, real and personal property in other states, may, if our law deems it fraudulent, be declared void, by the courts of this state. *D'Ivernois* v. *Leavitt*, 63

2. An assignment which authorizes the trustee to sell the assigned property *upon credit*, is fraudulent and void, as against the creditors of the assignors. *ib*

3. An assignment will also be rendered void by a provision which allows the assignee to withhold the division and distribution of the assets for any length of time which he, in his discretion, may think proper. *ib*

DEDICATION.

1. Where there has been an unequivocal dedication, by the owner of lands, to the public, for use as a highway, manifested by acts and declarations, and the road so dedicated is susceptible of public use or passage, so as to be made or become a highway, and it has been openly used in pursuance of the dedication, no formal act of acceptance by the public authorities is necessary, to give to the public a right to its unrestricted use, and that not as an easement or appurtenance to adjoining lands, or as a private right, but as a public right, requiring no interest in the neighboring property, or even business with its occupants, to justify its exercise. S B. STRONG, J., dissented. *Holdane* v. *Trustees of the Village of Cold Spring*, 103

2. User by the public is a sufficient acceptance of the dedication. But neither the intention to dedicate land to the public for the purposes of a street, nor the use thereof by the public in that manner, can make it a highway, or confer upon the public the rights of a highway in that which will not answer the settled definition of a highway. *ib*

5. Therefore, a *cul de sac*, or street which is closed at one end, and only communicates with a public road at the other, is not susceptible of dedication to public use as a highway. *ib*

4. It is essential to a public right, or a public use of a road, that it should be a *thoroughfare;* and that it should not be the means merely of access to the property of private persons, but the means of passage for the whole community from one public place to another. Without this, whatever private privileges may be created, no public rights arise. *ib*

5. Such a road could not be made a highway by laying it out as such, or other action, by the public authorities; neither can it become such by dedication. *ib*

DEED.

1. A sheriff, at the time of selling the real estate of D. T. on execution, *excepted* and reserved 63 acres of land formerly owned by D. T., but then belonging to W. S. He executed a certificate of the sale to B. the purchaser, in which he described the premises sold, as "being the whole of lot number four, &c. *excepting* and reserving therefrom the lands conveyed by D. T. to W. S." &c. He subsequently gave to B. a deed of the land purchased by him, describing it in the same manner. In fact D. T. never sold and conveyed any land to W. S. He had, prior to the sheriff's sale, conveyed the 63 acres to M., and M. had conveyed the same to W. S., who owned the land at the time of the sale. In an action by B. against a grantee of W. S. to recover the possession of a portion of the 63 acres, on the ground that the 63 acres were not embraced in the exception, but were sold, with the rest of lot No. 4, and were bid off by B. and conveyed to him by the sheriff's deed, parol evidence was received which clearly showed that the 63 acres were reserved by the sheriff, at the time of the sale, and that it was intended and supposed, at the time, that the exception in the certificate and deed embraced the 63 acres. *Held* that this was a proper case for a reformation of the sheriff's deed; it appearing that the description of

the premises, therein, was founded on a *mistake*; and the rights of creditors not being in question.—*Bartlett* v. *Judd*, 262

2. *Held also*, that, both parties claiming under the same title, were in privity, so as to authorize the interposition of a court of equity; and that the code (§ 150) authorized the defense to be set up, and the granting to the defendant of the affirmative relief to which he was entitled. (§ 274.) *ib*

3. *Held further*, that the statute requiring bills for relief, in all cases not otherwise provided for, to be filed within ten years, was not a bar to the relief sought by the defendant; that he, being the equitable owner, and in possession of the premises, the statute, as a bar to his equitable right, would not begin to run, until actual *eviction* by the holder of the legal title. *ib*

4. The equitable owner, in possession of the premises, is, under such circumstances, justifiable in waiting until an attempt shall be made by virtue of the mistaken deed, to disturb his possession. *ib*

5. Where a deed fails to convey a fee, for want of words of inheritance, a court of equity will reform it in that respect. And the parties may do the same thing, in effect, by their own voluntary act. *Wright* v. *Delafield*, 498

See SCHUYLER COUNTY, 2.

DESCENT.

1. By the 14th section of the title of the revised statutes relative to the descent of real property, in case of the death, without descendants, of an intestate who is illegitimate, the inheritance is to go to the relatives of the intestate on the part of his mother, only in case she be dead, which means, if she be dead at the time of the death of the intestate. *St. John* v. *Northrup*, 25

2. Where the mother is living, at the time of the death of an illegitimate intestate, the case provided for in the statute, in which the relatives of the intestate on the part of the mother shall inherit, does not arise, and the common law rule must govern. *ib*

3. And if the mother of the intestate is an alien, so that she cannot inherit the lands, the brother of the intestate cannot receive the inheritance through her. *ib*

4. By the common law, a person of illegitimate birth, not having inheritable blood, can neither inherit lands himself, nor transmit them by descent to any other person, excepting his own legitimate offspring, or persons otherwise capable of inheriting, claiming by inheritance from or through them. *ib*

See WILL, 2.

DOGS.

1. Where a dog, which has the vicious habit of attacking and biting other dogs, without being incited to do so, is suffered to go at large, and he attacks and kills the dog of a person lawfully coming upon the premises where he is, his owner is liable in damages for the value of the dog so killed, where it is shown that such owner had knowledge of the viciousness of his dog. *Wheeler* v. *Brant*, 324

2. A dog which is accustomed to attack and bite other dogs, without being incited to do so, is a vicious animal; whether it has been trained to such habits or not. *ib*

3. Vicious dogs are a nuisance; and their owners must either kill them, or confine them, as soon as they have notice of their dangerous habits; or answer in damages for injuries inflicted by them. *ib*

DOWER.

1. Where, upon a sale of land, a mortgage is given by the purchaser to secure the purchase money, or a part thereof, the mortgagor and his grantees have each of them such a seisin of the equity of redemption

in the land that their wives would be entitled to dower in that portion conveyed to their respective husbands subject to the payment of the mortgage. *Mills* v. *Van Voorhis*, 125

2 The wives of such grantees can, therefore, in case they survive their husbands, come in and redeem the mortgage, and so obtain dower. *ib*

3 Such an interest in the equity of redemption, and consequent right to redeem, cannot be barred or divested by a foreclosure or sale in a suit to which the wife is not a party; whether the right be, at the time, actual or inchoate. S. B. STRONG, J., dissented. *ib*

4. The wives of the grantees of the mortgagor are therefore necessary parties to a suit for the foreclosure of the mortgage. *ib*

5 Where the state of the title is fully known to both parties, at the time of contracting for the sale, and the vendor offers the purchaser all the title he has, he does all in his power to perform his agreement. And if the purchaser declines accepting that title, he cannot bring a suit in equity to compel the vendor to give a complete and perfect title. *ib*

E

EASEMENT.

See COVENANT, 1, 2.

EJECTMENT.

1 Where a complaint, in ejectment, described the premises as *about* fifty acres in the southern part of a lot, which was fully and perfectly described; *Held* that this was a sufficient description; but that if necessary the complaint could be amended, by striking out the word "about." *St. John* v. *Northrup*, 25

2. Upon the trial of an action of ejectment, brought in the names of several plaintiffs, the defendant's counsel, upon the opening of the case, moved for judgment on the ground that the complaint did not state facts sufficient to constitute a cause of action in favor of either of the plaintiffs separately, or in favor of all of them, jointly, whereupon the plaintiff's counsel offered to rely upon the title of F. S., one of the plaintiffs, and moved for leave to amend the complaint so as to set up title in him alone. The judge permitted the trial to proceed upon the offer of the plaintiff's counsel to rely exclusively upon the title of F. S.: leaving the plaintiffs to apply for leave to amend. The court, at special term, subsequently made an order giving leave to the plaintiffs to amend the complaint, so as to charge that the title was in F. S. alone. *Held*, that the rulings at the circuit were upon questions of practice, not affecting the merits of the controversy; and that they were within the discretion of the court, and did not form sufficient grounds for granting a new trial, or for refusing judgment for the plaintiff upon a case. *ib*

3. In an action under the code, to recover the possession of real estate, the complaint is sufficient if it states that the plaintiff has the lawful title, as the owner in fee simple, to the premises described therein, and that the defendant is in possession of the premises, and unlawfully withholds possession of the same from the plaintiff, and the plaintiff demands that the defendant may be adjudged to surrender the possession to him, and to pay damages for the unlawful withholding of the same, &c. *Walter* v. *Lockwood*. 228

EQUITY.

See DEED, 5.

EVIDENCE.

1. A bond of indemnity, given to the sheriff of Monroe county, acknowledged before a commissioner of deeds in the city of New York, cannot be read in evidence at the circuit in Monroe county, without the certificate of the clerk of the county of New York, authenticating the certificate of the commissioner.—*Campbell* v. *Hoyt*, 655

2. It was not the intention of the legislature, by the 9th section of the act of 1833, relative to the proof and acknowledgment of written instruments, to discriminate between conveyances of real estate, and other written instruments, in regard to their authentication by the county clerk, for the purpose of evidence, as previously provided by the revised statutes. *ib*

3. The latter instruments may be proved or acknowledged in the manner provided for the proof or acknowledgment of conveyances of real estate, and the certificate to the proper officer, indorsed thereon, will entitle them to be received in evidence, with the same effect, and in the same manner, as if they were such conveyances. *ib*

4. Such instruments may be received as evidence upon the certificate of proof or acknowledgment, in the same manner as deeds of lands, viz: upon that certificate alone, within the county of the officer, and elsewhere upon that certificate with an additional certificate of the county clerk, authenticating it. *ib*

5. Where it was proved that a physician attended the birth of a person whose age was the subject of inquiry in the action; that he was in practice from a period many years prior to the birth to several years afterwards; that he kept a register of all his cases of births; and that in this register was an entry of the birth of such person, at a time specified; and subsequent entries of the birth of a brother and sister; *Held* that the entries were competent evidence, after the death of the physician making them.—*Arms* v. *Middleton*, 571

6. Such a case comes within the rule that entries made by a third person, in the usual course of professional employment, or of a clerkship or agency, are, after the death of the person making them, competent evidence, as being part of the *res gestæ*. *ib*

7. It is not necessary that there should be an absolute duty, on doing an act, to make an entry of it, to render the entry admissible after the death of the person making it. It is sufficient that it is a proper case for making an entry of the act, and that such is the usual practice of the individual. *ib*

See GUARDIAN AND WARD, 1.
MARRIAGE PROMISE.
VENDOR AND PURCHASER, 10, 11, 12, 13.
WILL, 2, 3, 5, 6.

EXECUTION.

1. Where a judgment debtor has three horses, either two of which may constitute a team, and one of the horses is levied upon by a constable, by virtue of an execution, the debtor may, at the time of the levy, or within a reasonable time after he has notice thereof, elect to claim such horse as exempt property. If he fails to make such election he cannot maintain replevin against the officer. BALCOM, J., dissented. *Seaman* v. *Luce*, 240

2. If a debtor has more than two horses, which are worth, in the aggregate, over $150, notwithstanding two of them are necessary for him as a team and are therefore exempt from execution, yet a constable has a legal right to levy upon and take away either one of the horses, on execution against the debtor, leaving property, including the other horses, worth more than $150; and cannot be made a trespasser for so doing, unless the debtor makes his election, at the time of the levy, to claim the horse levied upon, as exempt. BALCOM, J., dissented. *ib*

3. The debtor can only recover for the detention of the horse levied on, after giving notice to the officer that he claims such horse as exempt, and after demanding such horse, and giving the officer an opportunity to return the same. *ib*

4. On the 2d of February, 1839, the plaintiff had title in fee to certain lands. On that day P. recovered a judgment against him, for $244.29. On the 1st of July, 1839, F. recovered a judgment against the plaintiff and B. for $907.45. These judgments were liens on the lands. The sheriff, by virtue of executions issued to him thereon, advertised the lands

for sale, and sold the same, on one or both of the executions, to P., on the 25th of November, 1839, for $305, the amount due on P.'s execution, which was returned satisfied. The execution in favor of F. was returned unsatisfied. The sheriff's certificate stated that he sold the lands by virtue of *both executions*. The plaintiff failed to redeem the lands within the time given him by law; but within the time allowed for judgment creditors to redeem, F., by virtue of his judgment, redeemed the lands, by paying to the sheriff the amount of P.'s bid. At the end of fifteen months from the sale the sheriff gave to F. a deed of the lands, which recited a sale of the lands *upon P.'s execution alone*, and the redemption by F. on his judgment. Under this deed F. went into possession of the lands. *Held* that if the sheriff sold the lands solely upon P.'s execution, F. obtained the legal title thereto. And that it was a question of fact for the referee to determine, whether the sheriff sold upon P.'s execution alone, or upon both.—*Buck* v. *Fox*, 259

5. *Held further*, that in the absence of any decision by the referee upon that question, P.'s equitable right to the lands was superior to the plaintiff's title to the same; and that, as F. must be deemed to have acquired the equitable rights of P., by the payment to the sheriff of the amount of P.'s bid, his equitable right to the lands must prevail over any title the plaintiff had to the same. *ib*

EXECUTORS AND ADMINISTRATORS.

See SURROGATE.

EXEMPT PROPERTY.

See EXECUTION, 1, 2, 3.

F

FORECLOSURE SUIT.

1. The owner of the equity of redemption is a necessary party to a suit for the foreclosure of a mortgage And the objection that he is not made a party may be made by the mortgagor, in his answer. *Hall* v. *Nelson*, 88

2. The fact that the deed from the mortgagor to the present owner of the equity of redemption was not recorded, at the time of the commencement of the foreclosure suit, and of the filing of the notice of lis pendens, does not render the case an exception to the general rule. *ib*

3. Where a suit is instituted for the foreclosure of a mortgage, and during its pendency the mortgagors are declared bankrupts, and they assign their property to the official or general assignee in bankruptcy, such assignee need not be made a party to the suit. *Cleveland* v. *Boerum*, 201

4. And if the assignee, without making any effort to be substituted as a party, or to interfere in the foreclosure suit, suffers the same to proceed to judgment, and sales to be made to innocent purchasers, by whom the lands are improved, and he then sells and conveys the right and interest of the bankrupts in the equity of redemption, to third persons, the latter cannot redeem the mortgaged premises from the mortgage and sale. *ib*

5. Under such circumstances, the equity of redemption of the mortgagors, and all claiming under them as purchasers, whose title accrued after the notice of *lis pendens* in the foreclosure suit was filed, including their assignee in bankruptcy, is effectually barred by the decree in that suit. *ib*

FOREIGN LAWS.

1. In the absence of proof to the contrary, it is to be presumed that the laws of another state are the same as ours, in respect to contracts relating to personal estate, and as to commercial matters particularly; and that when the common law is known to prevail, it is construed there as it is with us, whether relating to lands or personal property. *Wright* v. *Delafield*. 498

2. But no such presumption can be entertained in respect to the statute law of this state. *ib*

FRAUD.

1. When a party has been induced to enter into a contract by fraud, he may, on discovering the fraud, rescind the contract; and by restoring the other party to the condition in which he stood previous to making the contract, he may claim a return of what he has parted with, provided he does so at the earliest moment after discovering the fraud. *Devendorf* v. *Beardsley*, 656

2. But where fraud is set up as a defense to an action on a contract, the defendant must aver, in his answer, that he has done all in his power to restore the plaintiff to his former condition; otherwise he cannot prove the fact, on the trial. *ib*

See AGREEMENT, 1.

FRAUDS, STATUTE OF.

See AGREEMENT, 8.

G

GIFT.

See HUSBAND AND WIFE, 1.

GUARANTY.

1. Where, upon the assignment of a bond and mortgage, the holder guaranties "the collection of all sums of money unpaid upon said bond and mortgage, with costs," it is a condition precedent to any liability of the guarantor, that the assignee shall, within a reasonable time, institute legal proceedings upon the securities, and prosecute the same with diligence to a consummation. *Newell* v. *Fowler*, 628

2. Nothing will excuse the party holding the guaranty from the performance of this condition, except the act of the guarantor himself. It will not suffice for such party to say it would have been of no use to prosecute. *ib*

3. Nor will a waiver, by the guarantor, of proceedings to foreclose the mortgage, excuse the assignee from proceeding against the mortgagor, or his estate, upon the bond. *ib*

4. Such a contract of guaranty imposes upon the assignee the burthen of exhausting, by legal proceedings, every remedy which the bond and mortgage give him, before the guarantor's liability will become fixed. *ib*

GUARDIAN AND WARD.

1. In an action upon the official bond of a general guardian, brought against the principal and surety, in which a part of the breaches assigned are the fraudulent acts of the guardian in proceedings instituted by him for the sale of his wards' real estate, proceedings had before the surrogate for the removal of the guardian, and the judgment roll in an action brought by the wards against such guardian and others, in which action it was adjudged that the proceedings for the sale of the wards' real estate were fraudulent and void and were set aside, are not competent evidence against the surety, to prove the guardian's misconduct; the surety being neither a party nor a privy to those proceedings, and not being affected by them. *Clark* v. *Montgomery*, 464

2. And where it appears, in such action upon the guardian's bond, that the legal costs of the previous action, brought against the guardian and others, together with an extra allowance, have been paid, the plaintiffs cannot recover the sums paid by them to their counsel in that action. *ib*

3. Nor can the plaintiffs in such action recover the costs of the proceedings before the surrogate for the removal of the guardian; the bond given by the guardian not reaching or providing for such costs. *ib*

4. It is the duty of the general guardian of an infant to provide for the support, maintenance and education of the infant out of his estate; notwith-

standing the infant has a father living; provided the father is poor, and unable to support him. And for sums expended for that purpose the guardian should be allowed, on the settlement of his accounts. *ib*

H.

HIGHWAYS.

1 Where commissioners of highways, in their determination or order refusing to lay out a road, state that twelve freeholders have met and decided that such road is necessary and proper, this is, in effect, an admission by them that such freeholders were competent, and unobjectionable. But as such a statement involves the question of jurisdiction, it is not conclusive, and may be re-examined by the referees appointed by the county court, on appeal from the order of the commissioners. *The People ex rel. Flint* v. *Cline*, 197

2. The fact that one of twelve freeholders who meet and view the site of a proposed road and certify whether it is necessary, and whether it will be proper to lay it out, is the brother-in-law of a trustee of a church which holds the title to a part of the land to be taken for such highway, does not render him incompetent to act. He is not "of kin to the owner" of the property, within the intent and meaning of the statute. *ib*

3 A trustee of a religious society is not literally an owner of its land. That is in fact owned by the society. Hence the relative of a trustee is not of kin to an owner. *ib*

See DEDICATION.

HUSBAND AND WIFE.

1. Where a husband deposited in a savings bank, money belonging to himself, to his own credit, saying he wanted it so that either he or his wife could draw the money, and both he and his wife entered their names on the signature book, opposite which the clerk of the bank wrote the words, "to be drawn by either," and a pass book was given to the husband, as a voucher for the deposit; *Held*, 1. That this was not a valid gift of the money to the wife; a delivery of the money, or at least of the evidence of the deposit, being indispensable to such a gift. 2. That upon the wife's surviving her husband, she was not entitled to the money on the ground of the deposit having been to the joint credit of both. 3. That the wife was not, in respect to the deposit, a creditor of the bank, but the husband was the sole creditor. 4. That the wife was a mere agent of the husband, in respect to the sum deposited, without any beneficial interest therein; and that so long as the authority to her was unrevoked she could draw the money, but that her authority terminated on the death of her husband. *Brown* v. *Brown*, 565

2. And the wife having, after the death of her husband, presented the pass book at the bank and drawn out the money, giving a receipt therefor, signed by her in behalf of her husband, it was *further held* that she was bound to refund the money, in an action at the suit of her husband's administrator. *il*

I

INJUNCTION.

See NEW YORK, CITY OF, 1.
SCHUYLER COUNTY, 5, 6, 8.

INSURANCE.

1. A policy of insurance is *prima facie* an admission, by the insurers, of the title of the insured to the property embraced in the policy; *it seems*. *Fowler* v. *The New York Indemnity Ins. Co* 143

2. It is not necessary, therefore, for the plaintiff, in an action upon a policy, to prove his title, until it has been assailed by the evidence; nor is it necessary to allege it, in his complaint. EMOTT, J., dissented. *ib*

3. Where a complaint alleged the making of an insurance upon "*his* [the

assured's] three story and attic stone building," and on "*his* water wheel" &c. "occupied by the said assured;" *Held*, that this was a sufficient averment of interest in the assured. *ib*

4. An allegation that a policy of insurance was "*duly* assigned" to the plaintiff, indicates that it was by a sealed instrument, and a consideration will be inferred. *ib*

5. An assessment, made by the receiver of a mutual insurance company, upon the premium notes, is not complete and consummated until it is ascertained, fixed and determined, by carrying out upon the extension book the amount which each member is to pay. And the notice of such assessment, if published before this is done, is premature. *Bangs* v. *McIntosh*, 591

6. The notice should state the amount which each member is to pay. Otherwise it will be insufficient and defective, and will not oblige the members to pay, or subject them to a suit upon the premium note. *ib*

7. Upon a recovery on a premium note, for the non-payment of an assessment, the plaintiff is not entitled to interest on the amount of the note; the recovery for the whole amount being in the nature of a penalty. *ib*

8. It is competent for the parties to a policy of insurance to make a valid agreement that an assignment of any interest of the assured, after a loss, shall avoid the policy. *Dey* v. *The Poughkeepsie Mutual Ins. Co.* 623

9. Where a policy provided that in case of any assignment, transfer or termination of the interest of the assured, or of any claim under the policy, whether prior or subsequent to loss, without the written consent of the assurers, the policy should thenceforth be void and of no effect; *Held*, that a transfer of the interest of one of the parties assured, by means of a general assignment of his property, &c. to the other party assured and a third person, made without the consent of the assurers, was within the interdiction of the policy, and released the assurers from all liability thereon *ib*

10. Insurers have a right to protect themselves against controversies with strangers, or persons other than those with whom they contract, by placing restrictions upon assignments of the policy. *ib*

11. An insurance company, organized under the general insurance law of April 10, 1849, is, by virtue of the act to provide for the formation of fire insurance companies, passed June 25, 1853, made subject to its provisions; and premium notes received after the latter act took effect are to be made to contribute towards the payment of losses and expenses, as therein provided. *Devendorf* v. *Beardsley*, 656

12. Before insolvency occurs, assessment by the directors is a prerequisite. After insolvency, a receiver appointed under section 39, 2 *R. S.* 463, takes charge of the property and effects of the company; its deposit notes are assets in his hands; the premium notes are not due, but only to become due when the extent of their liability is determined by assessment; and before an action can be brought, notice must be given of the assessment, and personal demand made. Such assessment may be made by the receiver. *ib*

13. No action can be sustained upon a premium note, given since the act of 1853 took effect, to a mutual insurance company, except it be to pay for losses or expenses actually accrued while such note was in force, and after assessment has been made. *ib*

14. Assessment, or apportionment, is a condition precedent, necessary to be averred in the complaint, and proved on the trial. *ib*

15. An order of the court, directing the receiver to "prosecute and collect the whole amount unpaid on the deposit and premium notes, by any and all legal and proper ways and means," will not authorize the receiver to sue without having made an assessment; inasmuch as the "amount unpaid" on a note, can only be determined by assessment. *ib*

16. Where a person is appointed the agent of an insurance company and empowered to solicit and receive risks of insurance; to receive applications

for insurance; and to take premiums and premium notes therefor, this constitutes him a general agent of the company, for the transaction of that particular kind of business; and the company is bound by his fraudulent representations, made in procuring insurances and premium notes. *ib*

INTEREST.

See INSURANCE, 7.

J

JUDGMENT.

1. A judgment, confessed in favor of a creditor to whom the debtor has previously assigned his property in trust for the benefit of creditors, the assignee being among the number, and who still claims under the assignment and seeks to enforce it, is fraudulent and void. If the creditor would enforce the judgment he must abandon the assignment. ROOSEVELT, J., dissented. *D'Ivernois* v. *Leavitt*, 63

2. Although no adjudication in fact, by the court, nor the agency of any judge of the court, is required to warrant, or in entering, a judgment by confession without action, under the code, yet the judgment has all the qualities, incidents and attributes of other judgments. The entry of such judgment requires the exercise of the jurisdiction of the court, and when entered the judgment is by law a judicial act of the court, recorded by its clerk. *Lanning* v. *Carpenter*, 402

3. Hence the provisions of § 384 of the code, relative to the entry of judgments by confession, are only applicable to county organizations which are complete, as to the jurisdiction of the court, as well as for other purposes; in which, as such, the court may pronounce judgment, and has a clerk to enter its judgments. *ib*

4. Where the organization does not exist, as to such jurisdiction, no judgment of the court can be entered which depends in any way upon that organization for its validity; nor can a county clerk be *ex officio* clerk of the supreme court, in a county which is not organized as to such court. *ib*

5. Accordingly *held* that a judgment in the supreme court, by confession, entered in the clerk's office of the county of Schuyler, prior to the census mentioned in the act erecting that county, and consequently before the county had any legal existence in respect to the jurisdiction of that court, was null and void; and it was set aside, on motion. WELLES, J., dissented. *ib*

6. The object of the requirement of the second subdivision of § 383 of the code, respecting statements in writing, on confessions of judgment, was the same as that of the statute of 1818 on the same subject, viz: to point other creditors of the defendant to the precise transaction out of which the confessed indebtedness arose, to enable them to inquire into its truth, and to confine the defendant and the judgment creditor to that particular transaction, in case the good faith of the judgment confessed should be attacked. *Gandal* v. *Finn*, 652

7. But the statement under the code need not be as particular, specific or precise as that required by the former law. It may be concise and comprehensive, but still it must state the facts out of which the indebtedness arose, upon which the judgment is confessed. *ib*

8. In those cases where the indebtedness is for property sold, it should state when it was sold, the general nature of the property, and the time of credit, the price or aggregate of the purchase, and the amount of payments, if any. *ib*

9. The language of the code imports that the particular transaction out of which the indebtedness arose shall be specified and identified in the statement. *ib*

10. A statement in these words: "The above indebtedness arose on account, for goods, wares and merchandise, *and property* sold and delivered to me by the plaintiffs, for which I have

not paid, and the sum above confessed is justly due to the plaintiffs, without any fraud whatever," *held* defective, and the judgment entered upon it void. *ib*

11. A statement in this form: "The above indebtedness arose on account, for goods, wares and merchandise, sold and delivered by said plaintiff to me since the first day of January, 1855, and the sum above confessed is justly due to the said plaintiff without any fraud whatever," *also held* defective, and the judgment void. *ib*

JURISDICTION.

1. When the supreme court has acquired jurisdiction, it may amend any process or proceeding to retain it, and carry out and effectuate its object, in furtherance of justice. But it cannot make a void proceeding valid by an amendment in the same proceeding or matter. *Bangs* v. *McIntosh*, 591

2. And it is a fundamental rule, that where there is an absence of jurisdiction, the defect cannot be supplied by amendment or supplemental proceedings, so as to make the void proceedings valid from the beginning. *ib*

See JUDGMENT, 2, 3, 5.
JUSTICES' COURTS.

JUSTICES' COURTS.

1. The jurisdiction conferred on justices of the peace, in respect to actions upon justices' judgments, is general, and is not limited to cases in which the amount claimed does not exceed $100. *Humphrey* v. *Persons*, 313

2. A justice therefore has jurisdiction of an action upon a judgment rendered in a justice's court, and to render judgment for the amount due thereon, although it exceeds $100. *ib*

3. Although a summons issued by a justice claims damages to an amount exceeding $100, the defendant is bound to appear in the action; inasmuch as justices of the peace have jurisdiction of some actions, wherein judgments are claimed for sums over $100. *ib*

4. In an action upon a justice's judgment, it is not necessary that the summons should state that the complaint will be upon such judgment. *ib*

5. The omission of a justice of the peace to certify, in his docket, that the amounts appearing by such book to be due on the judgments therein have not been paid, to his knowledge; or to deposit such docket with the clerk of the town, on his removing therefrom, will not affect the validity of the judgments in the docket, or vary the effect of the same as evidence; the statutes requiring him to do so, being merely directory. *ib*

6. The fact that a justice's judgment, on which an action is brought, was recovered more than six years before suit commenced, is no cause for reversing a judgment given upon it, where the defendant did not appear in the latter suit, and plead the statute of limitations. *ib*

7. Although the statute applicable to justices' courts declares that in case a defendant does not appear and answer, the plaintiff cannot recover without proving his case, the plaintiff need not disprove any defense that must be specially pleaded, to be available to the defendant. *ib*

8. All that the plaintiff is obliged to prove, in such a case, is enough to entitle him to recover, if the allegations in the complaint were denied generally, by an answer. *ib*

9. Where a justice of the peace acquires jurisdition of an action, his judgment, although it be voidable for irregularities thereafter committed, is not void; and will uphold a judgment given upon it in a suit commenced thereon. *ib*

10. The statute prescribing what entries justices of the peace shall make in their dockets, is directory; and a literal compliance therewith is not necessary, when the entries show that the justice had jurisdiction of the parties, and of the subject matter of the action; and they also show the kind and amount of the judgment given, and that it was rendered at a proper time. *ib*

L

LEX LOCI.

1. The rights relating to the acquisition, enjoyment and disposition of real property are prescribed and regulated, exclusively, by the laws of the country in which the property is situated. *D'Ivernois* v. *Leavitt*, 63

2. Every community, independent and sovereign, possesses this power, as an inherent and essential element of its sovereignty. And no other community can interfere with the method by which real property may be acquired or lost, the tenure by which it may be held, the duration or quantity of interest in it, or the conditions to which the enjoyment of it is subject. *ib*

3 Yet an instrument purporting to dispose of real estate situated in another state or country may be within the reach of the laws of the state in which it is executed, and may be assailed on the ground that such instrument was in fraud of the citizens of that state, or that it was obtained from the grantor fraudulently. *ib*

4. Where a sale of personal property is made, and the property is delivered, in another state, and a bill of sale and inventory are also made out, and delivered, there, the validity of the transaction, both as to the sale itself, and the extrinsic acts, simultaneous with or subsequent to it, must be determined by the laws of that state. The courts of this state have no jurisdiction. *ib*

LIMITATIONS, STATUTE OF.

See DEED, 3.

M

MANDAMUS.

See SUPERVISORS, 5, 9.

MARRIAGE PROMISE.

1 In an action for the breach of a marriage promise, the plaintiff may show her acts of preparation for the marriage. *Wilcox* v. *Green*, 639

2. Where an act of a party is admissible in evidence, his declarations at the time, explanatory of that act, are also admissible as a part of the *res gestæ*. *ib*

3. Where A.'s promise to marry B. is shown, evidence that B. had received A.'s attentions and prepared for marriage by procuring the marriage dress and the wedding cake, and proof of B.'s statements to her sister at the time, explanatory of such acts of preparation, is competent to show her acceptance of such promise. *ib*

MONEY HAD AND RECEIVED.

See PRINCIPAL AND AGENT, 1.

MORTGAGE.

1. The law will never lend its aid to either of the parties to a fraud, to enforce an executory contract, nor to rescind or disturb one which has been executed, if founded in immorality or upon transactions forbidden by law. The maxim in such cases is, *in pari delicto potior est conditio defendentis*. *Westfall* v. *Jones*, 9

2. Accordingly, where a suit was pending against J. and others, and J., with the view and for the purpose of creating a lien upon his real estate, prior to any which should be created thereon by virtue of the judgment to be recovered against him in that action, if any, executed a mortgage upon his land to P., with the understanding that the same should be under the control of J., to be assigned and foreclosed if he should so direct, or to be delivered up and canceled if J. should succeed in his defense to the suit; and there was no other inducement or consideration for giving such mortgage; *it was held* that the mortgage was absolutely void, whether in the hands of the mortgagee, or of an assignee deriving title through him. *ib*

3. *Held, also*, that the assignee of such mortgage, although he took the assignment thereof in good faith, and

without notice or knowledge of the facts, had no other or greater rights in respect to the mortgage, and stood in no better condition to enforce it, than the mortgagee. *ib*

4. Persons purchasing mortgages can always protect themselves by inquiring of the mortgagors whether the securities are valid; and if they purchase upon the faith of the mortgagors' representations that the same are valid, the mortgagors will be estopped from setting up the contrary. *ib*

5. Where a purchaser neglects this precaution, he will be considered as taking the securities upon the credit of the assignor, as to their legal validity. *ib*

6 Taxes assessed upon mortgaged premises are a lien thereon, and when paid by the mortgagee, they cannot be deemed to have been paid in reliance merely on the personal liability of the mortgagor, but in his character of mortgagee and with a view to transfer the lien from the estate to the mortgagee. In other words, the payment is made for the benefit of the land, and in reliance on it as liable therefor; and should be regarded as conferring a lien in favor of the mortgagee, and as adding to the mortgage debt. *Kortright* v. *Cady*, 490

See FORECLOSURE SUIT.

N

NEW YORK (CITY OF.)

1. Land belonging, originally, to the city of New York, in fee simple absolute, was leased in perpetuity, at a small rent, to the officers of a religious corporation, for the purposes of a church and church yard, or cemetery, and subject to the condition of forfeiture should the lessees at any time "apply or convert the same to private or secular uses." By an ordinance of the common council, duly passed in 1844, authority was given to the commissioners of the sinking fund "to sell and dispose of all *real estate* belonging to the corporation and not in use for, or *reserved for public purposes*." *Held*, 1. That the property leased to the corporation was not in use for *public* purposes, within the meaning of the ordinance; the exception having reference to the parks, squares, court-houses, almshouses, engine-houses, and other grounds and buildings of that nature, possessing a general city character and devoted to general city uses, other than mere revenue, and not to grounds occupied by a particular denomination of christians for their exclusive and special benefit. 2. That so far as the exception contained in the ordinance was concerned, the commissioners of the sinking fund had authority to sell the property in question. 3. That a contract, made by the commissioners, for the sale and release of the city's interest in the premises was either valid or void; if valid, that there was no *ground* for interference by injunction; and if void, that there was no *occasion* for interference. 4. That as to the trustees of the church, their interest was a vendible title. And the law would intend, until an overt act to the contrary was done, that the purchasers of that title contemplated either a continued devotion of the premises to the purposes of "public worship," as prescribed in the grant, or a regular dispensation from the stipulated observance, to be obtained from the common council. 5. That should the purchasers, treating such dispensation as unnecessary, convert the premises to secular uses, and thereby incur the forfeiture, the consequence, on that assumption, being, if enforced, a benefit instead of injury, to the tax payers, would afford no ground of complaint on their behalf, or for an injunction. *Arkenburgh* v. *Wood*, 360

2. The commissioners of the sinking fund, under their general authority to dispose of all the real estate of the city of New York, not in use for public purposes, have no power to release, or to bind the corporation to release, the condition of an ancient grant, requiring the grantees, on pain of forfeiture, to devote forever the premises granted, to religious and not secular uses. Such a diversion of the property

from the purposes originally contemplated, can only be authorized or ratified by a resolution of the common council, duly passed by both boards, in one and the same year. *ib*

8. No corporator or tax payer, individually, or on behalf of himself and all others, can sue for an injury to, or a misapplication of, the corporate property or franchises, except in cases of fraud, corruption or violation of law on the part of the functionaries intrusted with the corporate powers and duties. *ib*

NUISANCE.

1. The general rule, that the owner of land may use it according to his pleasure, is subject to this qualification, that he is not at liberty to use it in such a manner as to infringe the rights of others. *Pickard* v. *Collins*, 444

2. The maxim, so use your own that you injure not another's property, is supported by the soundest wisdom. But the injury intended is a legal injury; an invasion of some legal right, as erecting a building, or carrying on a business on one's own land, which so obstructs the enjoyment by another, of his property, as to amount to a nuisance; or removing the soil, or placing something on the soil of another. These are violations of absolute legal rights, and are strict legal injuries. *ib*

3. In an action to recover damages for a nuisance caused by the erection of a barn or stable upon the defendant's land adjoining the plaintiff's dwelling house, and allowing manure and filthy water to accumulate and stand in the cellar thereof, it is not erroneous for the judge to charge the jury that if the defendant constructed and adapted the barn so that, in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, the defendant is liable for the nuisance thus caused by his tenants, to whom he had let the barn. *ib*

4. Where a barn is built to be used in a certain way, and its use in that way would necessarily, under ordinary circumstances, be a nuisance, if it is let to a tenant who in fact uses it in that way, and such use proves noxious or injurious to adjoining occupants, the owner is liable for the injury. *ib*

5. But if the use of the barn in that way proves a nuisance, by reason of water in the cellar, and that is a special unusual circumstance, the owner is not liable for the nuisance, unless he knew, or had reason to believe, when he let the barn, that the use of it in the ordinary mode would prove a nuisance. *ib*

O

OFFICE.

Where an action is brought in the name of the people, on the relation of an individual, to test the right to an office, the name of the relator must be joined with the people, as plaintiff. But an omission to join the relator as a party, may be cured by amendment, without costs. *The People ex rel. Hawes* v. *Walker*, 304

P

PARTITION.

Mode of stating the estates and interests of the several owners, in a judgment in partition. *Hyatt* v. *Pugsley*, 287

PARTNERSHIP.

See ACCOUNT.

PLEADING.

See COMPLAINT.

PROOF AND ACKNOWLEDGMENT OF WRITTEN INSTRUMENTS.

See EVIDENCE, 1 to 6.

PRESCRIPTION.

The time for the enjoyment of an incorporeal hereditament to ripen into a title by prescription, has been fixed, in this state, in analogy with the period limited by the statute for the right of entry upon land, viz. 20 years. *Hammond* v. *Zehner*, 473

PRINCIPAL AND AGENT.

1. Where a party is in the possession of money which he has received upon a sale by him as agent of the plaintiff, of bonds issued by the plaintiff, which money belongs to the plaintiff, such party is liable for the amount, in an action for money had and received, notwithstanding the issue and sale of the bonds was unauthorized.—*Mayor &c. of Auburn* v. *Draper*, 425

2. Where the plaintiff, having a claim against the defendant, appointed H. & R. its agents to settle and arrange the same with the defendant, and R., without the concurrence of H., effected an arrangement with the defendant by which the latter turned out to R. certain real estate and securities in full satisfaction and discharge of the plaintiff's claim, and the plaintiff, on being informed of the arrangement, promptly repudiated the same, and directed the securities to be returned to the defendant; *Held*, that the plaintiff was bound by the settlement made by R. *ib*

PRINCIPAL AND SURETY.

1. Where a creditor takes the draft or check of the principal debtor, payable at a future day, in payment of the debt, this is a valid extension of credit, and if done without the consent of the sureties, discharges them from all liability. *Bangs* v. *Mosher*, 178

2. The legal effect of such a transaction is to suspend the right of action against the principal debtor, until after the maturity of the draft, and until default has been made in its payment. *ib*

R

RAIL ROAD COMPANIES.

1. Where land has been dedicated by the owner, to the public, for a street or highway, the title, for the time being, is in the people of the state; and if the people, through the legislature, authorizes the construction of a rail road through such street or highway, and the road is constructed accordingly, in a seasonable and proper manner, if the owners of property upon such street suffer loss or damage in consequence of the construction of the rail road, it is *damnum absque injuria*. *Corey* v. *The Buffalo, Corning and New York Rail Road Co.*, 482

2. In an action against a rail road company to recover damages for raising an embankment in front of the plaintiff's premises, and obstructing the access to the same, &c., by constructing its road through a public street in a village, the judge charged the jury that if the defendants had restored the street to its former state, or to such state as not unnecessarily to impair its usefulness, the plaintiffs were not entitled to recover; and that in determining that question they were to allow the defendants such use and occupancy of the street as was necessary for the construction and maintenance of their road in a proper manner within the rule stated; but that if the defendants did not restore the street to its former state, or to such state as not unnecessarily to impair its usefulness, and by reason thereof, the plaintiffs had been injured, &c., they were entitled to recover; *Held* that the charge was not erroneous. *ib*

3. The articles of association of a rail road company provided that the road should extend from Buffalo to connect with the N. Y. and Erie Rail Road at P. P. in the county of Steuben, and that it should pass through portions of the counties of Monroe and Ontario. The defendant subscribed these articles, for stock to the amount of $1000. After he had subscribed the articles, the road was located and constructed from Steuben county to Batavia, without passing through, or touching, either of the counties of

Monroe and Ontario. *Held* that this was a substantial departure from the contract, and one which released the defendant from his obligation to pay his subscription. *The Buffalo, Corning and New York Rail Road Co.* v. *Pottle*, 21

4. Where the act of incorporation, or articles of association, prescribe the limits within which a rail road company shall construct its road, it cannot, even under the 23d section of the general rail road act, alter or change the route, after it has been located, so as to transcend those limits; at least not without releasing previous subscribers for stock who have not consented to such change. *ib*

5. Where the charter of a rail road company required them to purchase a turnpike road running parallel to the proposed rail road, and to assume the liabilities of the turnpike corporation, and gave them the right to lay their rail road track across and along the bed of the turnpike, but required them to restore the road to its former state, or in a sufficient manner not to impair its usefulness; in pursuance of which charter the rail road company purchased the turnpike road, and laid out and constructed their rail road upon a line designated and located in accordance with such charter, the same being in some places, in close proximity with the turnpike; and the plaintiff, while traveling upon the turnpike, with a horse driven before a wagon, was passed by a train of cars moving on the track of the rail road, at a place where the two roads were very near each other, and the horse, at the sight and noise of the cars, became frightened, and ran off the turnpike, upon certain obstructions placed there by the rail road company in constructing its road, and the plaintiff was overturned and greatly injured: *Held*, in an action to recover damages for the injury, 1. That the plaintiff could not recover on the ground of an encroachment by the rail road, upon the turnpike way, and the negligence of the defendants in omitting to restore the latter to its original width, without proof of an encroachment in fact. 2. That to entitle the plaintiff to a verdict on the ground of the defendants' negligence, she must show that the negligence complained of was the proximate cause of the injury; and that in the absence of such proof, the defendants' liability was a question of law. And hence, that no recovery could be had because of the defendants having excavated earth, on the side of their track, in constructing the rail road, and left there exposed large stones, without erecting any protecting fence between the same and the turnpike. 3. That the defendants having the legal right to construct their rail road track upon its present location, they were not required to abandon that location, or any part of it, by reason of its contiguity to the turnpike; nor were they bound to erect fences, screens or guards between the two roads; neither the rail road charter nor the turnpike charter imposing any such duty, and no such obligation existing at common law. 4. That the fact that both roads were owned by the same corporation added nothing to its obligations or responsibilities; its duties to the public being precisely the same as they would have been were the two roads owned by separate corporations. 5. That in the use and management of the rail road, contiguous to the turnpike, the same responsibilities attached to the defendants that they would assume if the turnpike were a common highway. *Coy* v. *The Utica and Schenectady Rail Road Co.*, 643

6. Rail road companies, in the use and management of their roads, are bound only to exercise ordinary care; and the omission to erect fences, screens or guards between a rail road and a highway contiguous thereto cannot be considered a want of such care. *ib*

RECEIVER.

1. In 1853 D., the receiver of certain real estate, pursuant to an order of the court, executed a lease thereof to H., for twenty-one years from the 1st of May following, at an annual rent of $14,500; the lessee to pay all taxes and assessments, and to erect a building to cost at least $10,000, which was to belong to the owners of the land. The building was erected at a cost of about $30,000. Before the commencement of the term H. assigned the lease to M. for the whole

term, save one day only. The assignment was subject to the rents, covenants and conditions mentioned in the lease. M. entered into possession and collected the rents. He paid the annual rents to the receiver until May 1, 1855; at which time he declined making any further payment of rent at the rate agreed, but offered to the receiver to surrender the lease, and take a new one at $8000 a year. On the petition of the receiver, for advice and direction in the premises, it appeared that H., the original lessee, was irresponsible, and that more than three-fifths, in interest, of the owners of the property concurred in the application of the receiver and were in favor of accepting the offer of M., and nearly two-fifths in interest opposed it. The court refused to give its assent to the arrangement. *Lorillard* v. *Lorillard*, 528

2. *Held also*, that if M., the assignee, wished any favorable terms from the court, he should first pay all the rent in arrear, at the rate of $8000 a year, and all taxes and assessments, and surrender the lease; procuring a surrender from H. also. That if the parties interested were willing to accept that inferior sum, then M. might be discharged from further liability; and that the receiver should thereupon immediately advertise the premises to lease, for the residue of the term, at auction *ib*

1. *Held further*, that if M. did not consent to this, the receiver should immediately proceed to eject him and the occupants under him, by an action to recover the land and its profits; or in some other suitable way. *ib*

4. A receiver, or other party commencing a suit in the supreme court under a special authority, must state in his complaint that he has been duly appointed receiver, &c., and if issue is taken upon that allegation, he is bound to make due proof thereof. *Bangs* v. *McIntosh*, 591

See CORPORATION.

REDEMPTION OF LANDS.

1. A redemption of property, by a judgment creditor, from a sale upon execution, cannot be made by calling at the office of the county clerk, the same being the office of the sheriff, and paying to the clerk, for the sheriff, neither the sheriff nor any of his deputies being present, the amount of the purchaser's bid, with interest, and presenting the papers showing the creditor's interest. *Griffin* v. *Chase*, 278

2. Such redemption can only be made by payment to the purchaser or his personal representatives or assignees; or to one who has redeemed; or to the officer who made the sale; or, in case of his absence from the sheriff's office, to the sheriff, under-sheriff, or any deputy present at such office. Payment cannot be made to the county clerk, nor to any other person, as the agent of the sheriff; unless he has been authorized to act, in the matter of redeeming, by an appointment as under-sheriff or deputy. *ib*

3. Where a redemption has been attempted, by payment to a person not authorized to receive it, the sheriff's certificate of the redemption given to the redeeming creditor, being wholly unauthorized, is not evidence of the facts stated therein. *ib*

4. Nor is a certificate, given by the county clerk, to whom the necessary papers have been presented and the money paid, any evidence. He not being authorized to act in the redemption, has no authority to make a certificate. *ib*

5. A recital, in a deed given by the sheriff to a redeeming creditor, which states that C., as assignee of a judgment, &c. presented, *at the sheriff's office*, the papers required by law to be presented for the purpose of acquiring the right of the purchaser of the premises, and that having paid the amount required by law to be paid, for such purchase, he acquired the same, without stating *to whom* the papers were presented, or to whom the money was paid, will not *estop* the grantee in such deed from denying the regularity and validity of the redemption by C.; although such grantee claims title as a redeeming creditor from C. *ib*

6. Nor will the fact that the grantee in the sheriff's deed has, as pur

chaser at the sheriff s sale, accepted the money paid by C. on his attempted redemption, estop him from questioning the regularity of C.'s redemption. *ib*

REFEREE.

It is a most salutary rule that the decision of a referee, upon a question of fact—especially of fraud, where there is evidence on both sides, and the point is not entirely free from doubt—cannot be disturbed. *Murfey* v. *Brace*, 561

RELIGIOUS SOCIETIES.

1. The supreme court having, since the constitution of 1846 was adopted, succeeded to all the powers and authority formerly vested in the chancellor, an application for leave to sell the real estate of a religious corporation must now be made to the supreme court. *Wyatt* v. *Benson*, 327

2. Such an application can only be made by the *corporation*; and the court has no power to grant an order of sale, except upon the petition of the corporation. *ib*

3. Even the legally elected trustees of a religious society have no right or power to institute or carry on proceedings to sell the real estate of the society, without the consent of a majority of the corporation. *ib*

4. The corporation consists of every member of the congregation having the privilege of voting; and it was the intention of the legislature to place the control of the temporal affairs of religious societies in the hands of the majority of the corporators. *ib*

5. Where an order of the court, giving its consent to a sale of a church edifice, has been made, on the petition of a majority of the board of trustees of the society, but such petition was not authorized or sanctioned by a majority of the corporators, the order, if still *in fieri*, and not executed, no rights having been acquired under it is under the control of the court; and it is competent for the court to revoke its consent to the sale. *ib*

6. And it is the *duty* of the court to withdraw its consent, when it is apparent that the sale of the property would be in opposition to the views of a large majority of the corporators. *ib*

7. A religious corporation, not having the power to sell its real estate without the consent of the supreme court, cannot submit the question of sale to any other tribunal; and if an arbitrator is chosen, and he decides that the property shall be sold, his award is not binding upon any one, and gives no authority to make the sale. *ib*

8. The making of such an award, and its confirmation by an order of the court, will present no obstacle to the granting of relief, by injunction to stay the sale, where it is shown that a majority of the corporators are opposed to the sale. *ib*

9. Neither will corporators be bound by the submission to an arbitrator, of the question who are the legally elected trustees of the corporation. *ib*

10. A submission and award in reference to that question cannot legally determine who are the duly and lawfully elected trustees, and will not prevent a portion of the corporators from calling in question the right of those claiming to be trustees, to act as such. *ib*

11. In an action brought by a religious society, the plaintiffs must prove their corporate existence, if the fact is denied *Methodist Epis. Union Church* v. *Picket*, 436

12. What is sufficient proof of the incorporation. Herein of the form and requisites of the certificate of incorporation. *ib*

13. Where a certificate of incorporation was dated May 15, 1826, and it was proved that certain persons were trustees of the society in 1850; that the society then had a house of worship; and that a subscription paper was then circulated, for the

purpose of raising funds to remove the old house and erect another in its place; *Held* that this evidence warranted the conclusion that the society had, ever since the date of the certificate, acted under it as a corporation. *ib*

14. It is not required by the statute that a certificate of incorporation shall embrace any thing but the names of the persons elected trustees, and the name by which the trustees and their successors are thereafter to be called and known. Hence, although it is manifestly proper to show therein that all the requirements of the statute have been followed, the omission of particulars not necessary by the statute to be stated, does not affect the validity of the certificate. *ib*

15. And it seems that a compliance with the statute, in the particulars not required to appear in the certificate, may, in the absence of any proof to the contrary, be presumed or inferred from the certificate, duly acknowledged and recorded, and user under it; especially where that user has continued for nearly thirty years. *ib*

16. Although a certificate states that the presiding officers of the meeting at which trustees were elected, were chosen by a *plurality* of votes, when the statute requires those officers to be nominated by a *majority* of the members present, it will be presumed or inferred that the selection was according to the statute, if the certificate does not negative the fact that the officers were nominated by a majority, and the contrary is not proved. *ib*

17. A provision, in an agreement to pay money for the erection of a church, that the slips shall be sold at auction, to the highest bidder, upon the completion of the house, and that moneys subscribed may be applied in payment of bids, is not inoperative, so as to render subscriptions void. *ib*

18. Such provision for a sale is to be construed as meaning such a sale as the trustees are authorized by law to make, viz. a demise and lease of the slips. *ib*

19. A resolution of the trustees of a religious society, that the subscribers "be required to pay their respective subscriptions in full, and that the clerk call upon them and procure the payment," is a sufficient determination by the trustees, as to the time of payment; the effect of it being that payment shall be made immediately. *ib*

REPLEVIN.

1. Where, in an action for the recovery of personal property, the property is delivered to the plaintiff and he fails in the action, the defendant cannot now have a judgment for a return of the property, or a judgment for its value, at his election. But he must, under § 277 of the code, take a judgment in the alternative, for the return of the property, or for the value thereof as assessed, in case a return cannot be had. *Seaman* v. *Luce*, 240

2. Where a constable levies upon property by virtue of an execution, he has a special interest therein, as against the owner, to the amount due upon the execution, including his fees. And if the debtor brings replevin against the officer, and the latter has a verdict in his favor, the jury should assess the value of the property at that amount. *ib*

3. The rule was settled, previous to the code, that in an action between the general owner of property and one having only a lien upon it or a special interest in it, when the latter prevailed, his damages were limited to the amount of his lien or special interest, and this rule has not been changed by the code. *ib*

SCHUYLER COUNTY.

1. The words "a good unincumbered title," in the 18th section of the act of April 14, 1854, erecting the county of Schuyler, mean a title in fee simple absolute, free and clear from any legal exception or charge thereon. They import an estate without any prior claim, to continue forever, and having no qualification or condition in regard to its continuance. *Gillespie* v. *Broas*, 370

2. Accordingly *held* that a deed conveying land to the supervisors, "for the use of the people of the county of Schuyler as long as said lot or premises shall be and are occupied for a county site for the court house, jail and clerk's office of said county of Schuyler; and when said lot or premises shall cease to be used for the purposes aforesaid, then the same with its appurtenances &c. is to revert and belong to the said party of the first part, his heirs, &c. the same as if this conveyance had not been executed"—was not a compliance with the act, and did not convey such a title as was contemplated by it. WELLES, J., dissented. *ib*

3. *Held also*, that a good title to the premises selected for a site by the commissioners appointed for that purpose, not having been made, to the county, within the time prescribed, the selection became wholly inoperative, and notice should have been given, as directed by the act, to the commissioners, who should thereupon have made another selection. *ib*

4. *Held further*, that another selection of a site was a condition precedent to the right of the building commissioners to enter into a contract for the erection of public buildings; and that a contract for the erection of buildings, entered into without a second selection having been made, being, on the part of the building commissioners, without authority, imposed no obligation on the county, and the contractors who erected the buildings had no valid claim against the county therefor, WELLES, J., dissented. *ib*

5. Upon a complaint by individuals claiming to be residents of the county of Schuyler, owning real and personal property and being tax-payers therein, praying for an injunction to restrain the payment of the sum of $3000, (voted to be raised by the board of supervisors,) on orders issued to D. and N. in part payment for the erection of a court house, jail and clerk's office upon a site selected by the board of supervisors, under a contract between D. and N. and the supervisors; on the ground that the supervisors had no authority to establish a site or enter into the contract, and hence none to issue the orders, and that the orders were not, therefore, a valid claim against the county; the plaintiffs not suing in behalf of other tax-payers as well as themselves, and the county not being made a party to the action; *Held* that, assuming that the supervisors had no power to select a site for the buildings, and that the orders to D. & N. were therefore issued without authority, this was not a case for the interposition of the court by the extraordinary remedy of injunction; a *certiorari* to reverse the adjudication of the board of supervisors upon the claim, being the proper remedy. WELLES, J., dissented. *il*

6. The review and correction of errors of that nature is not within the equitable jurisdiction of the supreme court, with which an injunction is connected, but belongs to its legal jurisdiction, which is to be exercised by writ of certiorari, or in some other strictly legal mode. *ib*

7. But neither a certiorari nor an injunction is proper where the allowance of a claim by a board of supervisors was merely erroneous, and not void. *ib*

See JUDGMENT, 1 to 5.

SEQUESTRATION.

See CORPORATION.

STATUTES.

1. A statute that is not an expression of the legislative will alone, has no binding force as a law. It can only become a law mandatory and obligatory upon those who are the subjects of it, by a declaration of the legislative will. An attempt, therefore, to call in another party to aid in the business, and divide the responsibilities, of legislation, so that the act shall not be the single expression of the legislative will, but the sovereign function is discharged, in part at least, by a party unknown and unrecognized by the fundamental law, would be in contravention of the constitution, and render the act

void. But this should be patent and manifest on the act itself. *Corning* v *Green*, 33

2. The legislature may constitutionally pass a law, and provide that it shall take effect at some future period or upon the happening of some future event *ib*

3. They may also declare that an act passed by them shall cease to exist as a law, unless, within a specified period, an act mentioned in it to be done shall be performed by the person or body to be affected by it. *ib*

4. The cases of *Thorne* v. *Cramer*, (15 *Barb.* 112;) of *Bradley* v. *Baxter*, (*Id.* 122,) and of *Barto* v. *Himrod*, (4 *Seld.* 483,) are not in hostility to this principle. *ib*

5. The provision, in the 12th section of the act of April 5, 1823, authorizing the construction of a basin in the city of Albany, which required that the corporation of the city should file their consent to the act, within sixty days after the passing of the same, otherwise the act should be void, did not render the statute invalid. *ib*

6. By that statute the powers previously possessed by the corporation of the city of Albany were essentially *altered*; and it having received only a majority vote, it was not passed in accordance with the constitution then in force, which required the assent of two-thirds of the members of the legislature to every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, *altering* or renewing any body politic or corporate. The act was therefore inoperative and void. *ib*

7. The act of April 5, 1823, was not a *contract* between the state, the city of Albany and the proprietors of the pier, even if it had any validity. Therefore the act of April, 1850, granting the right to vessels to enter the basin without the payment of wharfage for so entering, unless they came to, lay at, or made fast to the pier, which was passed after the basin had become the exclusive property of the state, and the pier owners had released any interest they had therein, did not fall within the provision of the constitution of the United States which forbids a state from passing any law impairing the *obligation of contracts*. *ib*

8. The act of April, 1850, was a valid act. Hence the owners of vessels which do not come to, lie at, or make fast to, the pier on either side, are not liable for wharfage, at the suit of the pier owners *ib*

See SCHUYLER COUNTY, 1.

SUPERVISORS.

1. The board of supervisors, in each county, have conferred upon them, by law, most important powers, and in reference to all county charges they have the authority to direct the levying, collecting and raising of the same; and it is their duty to exercise that authority. *The People ex rel. Downing* v. *Stout*, 338

2. When a board of supervisors are required, by law, to audit and allow the accounts of a class of public officers, they have no discretion to exercise, but must allow the salary as fixed by law. *ib*

3. So, after the compensation of the city inspector of the city of New York, for keeping a record of births, deaths and marriages, has been fixed by the board of supervisors, under the authority conferred upon them by the statute, it becomes as binding and conclusive on the board, in reference to the auditing and allowance thereof, as though it had been fixed by the legislature itself. And the board has no discretion on the subject, but must audit and allow the accounts of the inspector, on the basis of the compensation thus established. *ib*

4. And it being the duty of the supervisors to direct the raising of such sums as may be necessary to defray and discharge all accounts chargeable against the county, and it having full and ample power to do so; and having, moreover, levied and collected the sum of $70,000 for *county contingencies*, under an act of the legislature, which prohibited the money from being expended or applied for any other purpose: *Held* that a fund was thus provided for the

payment of the city inspector's accounts, after they had been audited and allowed by the board of supervisors, and that a *mandamus* would lie to compel the treasurer of the city to pay such account. *ib*

5. *Held also*, that it was no excuse for not paying such accounts, that the fund had been exhausted in paying claims against the corporation, or for city contingencies. *ib*

6. The necessary expenses incurred in keeping the property of a county in repair, and to preserve it from decay, and keep it in a condition for use, is a proper and legal county charge. *The People ex rel. McSpedon* v. *Stout*, 349

7. And it being the duty of the supervisors to provide rooms suitable and sufficient for the transaction of the business of the courts, they have the authority to keep such rooms in order. Hence expenses incurred for cleaning and painting, and other needful reparations of the court rooms, are a proper and legal county charge. *ib*

8. And the amount thus expended, having been audited and allowed by the board of supervisors, such audit and allowance is final and conclusive, as to the amount. *ib*

9. But, in the city and county of New York, the board of supervisors are restrained by statute from entering into any contract for work to be done, or supplies furnished, for the corporation, involving an expenditure of more than $250, except by contract founded on sealed bids, or on proposals, made in compliance with a public notice of ten days, which contracts shall be given to the lowest bidder with adequate security. Therefore, where work amounting to over $250, is done, without any public notice being given, for bids or sealed proposals, and without any bids or proposals having been received, or any contract being executed, and the accounts for such work are audited and allowed by the board of supervisors, their act in auditing and allowing them is a mere nullity, and it is the duty of the county treasurer not to pay the accounts, and a mandamus compelling him to pay them will not be granted *ib*

10. A board of supervisors, having authority to commence suits, although they misjudge in regard to their having a cause of action, in a particular case, the fair charges of the attorneys and counsel employed by them, are a legal demand against the county; and after the amount of such charges has been allowed by the board, and orders issued therefor, the payment of such orders will not be restrained by injunction. *Gillespie* v. *Troas*, 379

SURROGATE.

1. Where, upon the death of a sole or surviving executor, application is made to the surrogate, for letters of administration with the will annexed, of the assets of the first testator left unadministered, *prima facie* evidence of the fact that there are such assets, left unadministered, is sufficient. *Pumpelly* v. *Tinkham*, 32

2. The general allegation, in the petition for letters, that the executors named in the will died, "leaving certain property and assets" of their testator "still unadministered," followed by a statement of the value thereof, is sufficient to confer jurisdiction upon the surrogate to issue letters to the applicant, where the petition is duly verified. *ib*

3. It is no objection to the appointment of an administrator with the will annexed, that owing to the lapse of time since the deceased executors took out letters testamentary, and the operation of the statute of limitations, such appointment would confer only a barren office upon the person appointed. *ib*

4. Upon such an application, the surrogate has no right to determine the question whether the applicant, if appointed administrator, could recover any of the alleged unadministered assets of the deceased testator; or would have any legal or equitable cause of action against the representatives, or heirs, or next of kin of the deceased executors. *ib*

T

TENDER.

1. An answer, alleging that on &c., the defendant tendered to the plaintiff's attorney the principal, interest and costs then due, without averring a readiness still to pay the same, or that the amount is paid into court, or offering to bring it into court, is defective. *Kortright* v. *Cady*, 490

2. An averment of a present readiness to pay, is an essential part of a plea of tender. *ib*

3. It is also essential to a perfect tender that the party should not only once offer the money, but that he should be always ready to pay it; so that a prior or subsequent demand and refusal to pay, is a good replication to the plea of tender, and makes the tender a nullity. *ib*

4. A tender of the amount due upon a mortgage, made after the day on which the mortgage money becomes payable, and after a foreclosure suit has been commenced, will not discharge the lien of the mortgage, so as to bar the bill for foreclosure. *ib*

5 In case of a note, or similar obligation, payable in specific articles, where nothing is to be done by the creditor but to receive performance, a tender of the articles at the time and place appointed for performance discharges the debt; the property becomes the payee's and the maker holds the same as his bailee, and at his expense and risk. *Billings* v. *Vanderbeck*, 546

6 This rule prevails where the relation of debtor and creditor exists. But the doctrine does not, as a general rule, apply to cases of contracts executory on both sides. *ib*

TRUSTEES.

1. The law is well settled, in this state, that trustees, where nothing is said in the deed or instrument creating the trust, as to their compensation, are entitled to the same commissions as are allowed by law to executors and guardians. *Wagstaff* v. *Lowerre*, 210

2. In computing the commissions of a trustee, the amount of property held by him in trust is the proper basis of allowance; without making any distinction between real and personal estate. *ib*

V

VENDOR AND PURCHASER.

1. *Of real estate.*

1. When the title to land fails, especially where the vendor honestly supposed he had title when he contracted to sell the land, the remedy of the vendee is a proper action for damages. *Mills* v. *Van Voorhis*, 125

2. On the 28th of November, 1835, several proprietors of land, in pursuance of an agreement previously entered into, and for the purpose of vesting the whole title to the lands in trustees, so that the latter could sell, and give a good title to purchasers, without the intervention of the proprietors, by deed referring to the agreement, conveyed the land to three trustees and their successors, to hold to the use and benefit of the proprietors, but no words of inheritance, and no express words showing the duration of the trust or of the estate granted, were used. On the 28th of November, 1838, a majority of the proprietors, pursuant to a clause in the original articles of agreement, signed an agreement modifying those articles and appointing C. & G. trustees in place of the three original trustees, and directing the latter to convey to C. & G. *the legal estate* in the lands. Accordingly, on the 29th of November, 1838, the original trustees conveyed the land to C. & G. with *words of inheritance*. On the 27th of November, 1843, D. & C. were appointed trustees, the former in the place of G., and the proprietors directed G. to convey the *legal estate* to D. & C. as trustees, and G. accordingly conveyed to D. & C. with words of inheritance. In 1844 and 1848 the proprietors expressly declared that D. & C. were thereby "*continued* in office as trustees." *Held* that this was a recognition of D. & C. as lawfully existing trustees, with such estate as was granted to them, and

a reappointment of them with the like estate. That it was a confirmation of the conveyance to the new trustees, and bound the proprietors; especially as it was in conformity with the actual intention of the original articles. And that D. & C. as such trustees, could give a legal and equitable title to a purchaser, unless it was affirmatively shown that there was some defect in the original title of the proprietors, or that the land was incumbered, or the trust deed was void. *Wright* v. *Delafield*, 498

8. *Held also*, that the original trust deed of November 28th, 1835, was valid as a power in trust, under the revised statutes; and that the present trustees could give a good title, by virtue of the power in trust granted to them. *ib*

4. *Held, further*, that where a party purchased a portion of the trust property of the trustees, in 1841, he at that time being also an owner of 11 out of 2400 shares of which the whole property consisted; and had remained in possession, under the trustees, and received the rents, and paid three installments upon his purchase, not showing any other proprietor, under whom he held, he could not refuse to pay the consideration agreed on for his purchase, without offering to rescind the contract and deliver up the property. *ib*

5 *Also held*, that the purchaser could not keep the land and refuse to pay for it; whether the title was good or bad. That if it was bad, he must elect to take it as it was, or as the proprietors could make it, and pay for it; or else to give it up and account for the rents and profits. And that, as he did not elect to do the last, he must pay for the land. *ib*

6. Generally, the question whether a good title can be made is to be passed upon before a referee, and so also is an account to be taken before him. But the parties may, if they choose, and the court consent, have those matters inquired into by the court. *ib*

7. Where a purchaser seeks a specific performance, he is bound to pay notes given by him for the purchase money, and interest, together with the costs of suits brought against him upon those notes, and the costs of the suit for a specific performance, before he will be entitled to a deed. *ib*

2. *Of chattels.*

8. In cases of executed sales of personal property, the common law rule is that the vendor is not liable for damages arising from latent defects known to him and unknown to the purchaser; except when the vendor has warranted the article sold, or has made false representations, or has used some active means to conceal such defects, or some artifice to mislead or deceive the purchaser in regard to such defects. *Paul* v. *Hadley*, 521

9. If the vendor is merely *silent*, he is not responsible for damages by reason of such defects. The rule of *caveat emptor* applies, in such cases. *ib*

10. In an action by a vendor, to recover the possession of goods alleged to have been obtained from him by the purchaser, by means of false and fraudulent representations, proof of what the purchaser said, at the time of the purchase, in regard to the reasons for his not trading with another firm, viz. that that firm had refused to trust him without security, is immaterial and irrelevant. *Murphy* v. *Brace*, 561

11. Nor can evidence be given of representations made by the purchaser, to another firm, in respect to his pecuniary circumstances, about the time of his purchase from the plaintiff; where it is not shown, or pretended, that he purchased any goods of that firm on credit, or that he had defrauded or intended to defraud such firm. *ib*

12. Proof that a person about purchasing goods, makes false representations, in respect to his responsibility, to one firm, will not prove, nor tend to prove, that he made similar representations to another firm, of whom he purchases. *ib*

13. Such a case is distinguishable from the cases in which it has been held that, on questions of fraud in the sale or purchase of property, similar transactions of the alleged fraudulent party, with other persons, at about

the same time of the transaction in question, may be proved, with a view of showing the *quo animo*. *ib*

VERDICT.

1. Unless a jury has clearly and palpably decided against the weight of evidence, their verdict will not be set aside. *Erben* v. *Lorillard*, 82

2. L. applied to the New York Gas Company to purchase a piece of land. The price asked by the president was $75,000, and he told L. that E. would take the land on lease at a rent of eight per cent on the cost. L. then called on E., who said he would take a lease for 21 years, at eight per cent on the purchase price, but that he thought the price asked was too high, and that the property could be got for $60,000. L. then employed E. to negotiate the purchase at the latter sum, under a promise of a lease for 21 years at eight per cent. E. negotiated with the company until they agreed to sell at $55,000, at which amount L. purchased, and took a conveyance. L. then refused to fulfill his agreement with E. and leased the property to other persons. In an action by E. to recover of L. for his services, the plaintiff, as evidence pertinent to show the value of his services, offered to prove the value of the promised lease. The evidence was admitted, under objection, but in summing up, the judge directed the jury to leave out of view all evidence given of the value of the lease. The jury having rendered a verdict in favor of the plaintiff for $2000; the court refused to set aside such verdict as being against the weight of evidence.—ROOSEVELT, J., dissented. *ib*

W

WILL.

1 A testator, by his will, executed in 1824, bequeathed to his wife an annuity of $3000 during her life, to be paid out of the income of his estate. He also gave her certain personal property; which bequests were in lieu of dower. He then gave to each of his children, two sons and three daughters, $1000, to be paid to them, respectively, each year, until the division of his estate. The testator then devised his real estate as follows: one-fifth part thereof to his son David, in fee; one-fifth part to his son Alfred (the plaintiff) in fee; one other fifth part to his two sons and to F. upon trust, that upon the division of his estate they should either suffer his daughter Catharine to take, to her own use, during her life, the rents, &c. of the said one-fifth part, or that said trustees should take and receive said rents, &c., and after deducting all costs, taxes, &c., pay over to said Catharine, during life, the net proceeds of said one-fifth part; and that upon her death the trustees should convey the said one-fifth part to her rightful heirs, share and share alike. The testator devised one other fifth part of his real estate to the same trustees, for the benefit of each of his other daughters, Ann and Sarah Louisa, upon the same trust, and with the like provisions. The testator made the same disposition of his personal estate which he had made of his real, viz: one-fifth part to each of his sons, to be paid to him upon the division thereof, and one-fifth to be paid to the same trustees, to be held by them upon the same trusts as were applicable to the real estate, for the benefit of each of his daughters. The testator directed that no division of his real or personal estate should take place until one year after the decease of his wife, and until one year after his youngest child should attain the age of twenty-one years. He also directed his executors and trustees, for the benefit of his estate, to let and rent out his real estate until such division should take place, and to invest his personal estate upon stocks, or security of real estate. The testator also directed that in case all or either of his daughters should marry, his executors should pay to each of them, out of that portion of his personal estate previously given to them in trust, the sum of $10,000, which sum, on a division of his estate, was to be deducted from the share or portion so given for the benefit of said daughter; and that on the payment of said sum of

$10,000 the annual payment of $1000 should cease, and in lieu thereof each daughter was to receive $300 each year until the division of the estate. The testator appointed his two sons and F. executors. Previous to Sept. 5, 1828, David, one of the sons, died, leaving two children, and on that day the testator executed a codicil to his will, whereby he revoked the devises and bequests made to said David. He then gave to his son Alfred the part and share of his estate, real and personal, which had been given to David, with a provision that if Alfred should die without leaving issue, then such part and share should go to, and vest in, the surviving children. The testator died in Sept. 1828. His widow died on the 15th of March, 1854, and according to the terms of the will, the division of the estate was to be made on the 15th of March, 1855. Ann, one of the daughters of the testator, died, after the testator's decease, leaving a husband and children. *Held*, 1. That under the codicil, Alfred was entitled to all that part of the estate given by the will to David, and which the latter would have taken if he had lived. That he was therefore entitled to the annual advance of $1000, given to David from the death of the testator until the division of the estate; that payment not being an annuity, but a rent-charge, descending to the heirs. 2. That it was the intention of the testator that his estate should remain in mass until the expiration of one year from the death of his wife, and until the youngest child came of age. 3. That the testator contemplated that there would be a surplus of rents and income beyond the payments directed to be made previous to the making of the division; and that it was his intention that any such surplus should be from time to time invested, and form a part of his personal estate, and be divided, finally, as such. 4. That if the intervening rents and income, from the death of the testator down to the time of the division, were in fact undisposed of, they fell into the residue of the real and personal estates respectively. 5. That the trusts respecting the shares of the daughters were legal and valid trusts; that they were not passive, but active; that they were not executed but executory trusts, and that the rule in Shelley's case had no application to them; but that they were saved by § 48 of the article of the revised statutes relative to uses and trusts. 6. That there was therefore no accumulation of the rents and profits to which Ann was entitled, on the division, and hence nothing which her administrator was entitled to receive. But that she was entitled to the income accruing from her share of the estate, real and personal, from the time of the division down to the time of her death. 7. That as to a portion of the real estate of the testator which had been taken by public authority, for public use, during the coverture of the testator's daughter Ann, the proceeds were to be regarded and treated as land, and not as money. But that whether land or personal estate, such proceeds, as to the three-fifths in which the daughters were beneficially interested, went to the executors or trustees, in trust, and the daughters had only a life interest therein. 8. That the plaintiff was entitled to his commissions, as trustee, upon the real as well as upon the personal estate held by him in trust. *Wagstaff* v *Lowerre* 201

2. T. Pugsley, being seised in fee of a tract of land called the Cow Neck farm, died intestate, and the land descended to his sons, Isaac L. and Oakley, who were his only heirs at law. Isaac L. died intestate and without descendants, in the lifetime of his brother, and his half of the farm descended to Oakley Pugsley, who thereupon became and continued to be until the time of his death, seised in fee of the whole of it. He made a will, containing the following provisions: "*First.* After all my lawful debts are paid and discharged, I give and bequeath unto William Pugsley, Samuel Pugsley, Benjamin Pugsley and James Pugsley, sons of Samuel Pugsley of North Salem, all my household furniture, farming utensils, and what stock I have on the farm where I now reside. I also give and bequeath unto William, son of James Pugsley of Ossining, my large silver tankard, &c. I do give and devise unto Samuel Pugsley, William Pugs-

ley and James Pugsley, near Cayuga lake in this state, the farm where I now reside, &c. containing about 160 acres, and the Cow Neck farm. I do also give and devise unto the said last named Samuel, William, Benjamin and James" three houses in the city of New York. After specifying several intermediate devises and bequests, the will contained this clause: "I do also give unto William Pugsley, Samuel Pugsley, Benjamin Pugsley and James Pugsley, sons of Samuel Pugsley of North Salem, Westchester county, the personal property aforesaid, and no more." The testator died in 1853, leaving no living ancestor, nor any descendant, brother or sister, or any descendant of a brother or sister. His heirs at law were the descendants of the brothers and sister of his father, and of the brothers and sisters of his mother. The nearest heirs, on each side, were his first cousins. *Held*, 1. That parol evidence was inadmissible for the purpose of showing that the testator intended to, and did, in effect, devise a portion of the Cow Neck farm to Benjamin Pugsley, (1) because it was designed to explain a patent ambiguity, and (2) because it would, if it could have any effect, create a new devise. That if Benjamin Pugsley took any interest in the premises, under the will, it was by implication; and that was a question of law, which could not be elucidated by any extrinsic evidence as to the intention of the testator. 2. That the language used by the testator simply raised a conjecture that he might have supposed that he had included Benjamin Pugsley's name as one of the devisees, but that it was too remote either to alter the estate expressly given to others, or to confer any upon him. And that Benjamin Pugsley took no part of the Cow Neck farm under the will. 3. That James Pugsley, the only surviving devisee named in the will, took thereby only the one-third part of the Cow Neck farm. 4. That the remaining two-third parts of the premises descended to the heirs at law of the testator; and that one of those third parts descended to the descendants of the brother and sister of his father. That as to such third, the inheritance came to the testato. on the part of his father; but as to the remaining third part, being the half of what was not effectually devised, that did not come to him on the part of his father but it came to him from his brother. 5. That under the rule that collateral descent from brother to brother is immediate, taking no notice of the father, the one-third part of the farm, being the half of what did not pass under the will, descended to both the paternal and maternal collateral relatives of the testator. 6. That had all the first cousins of the testator survived him they would have inherited equal parts of what descended to them respectively. But that, as several of them had previously died, the cousins must be assumed as the stock, and the inheritance be divided into as many equal shares as there were first cousins living, or who had died leaving descendants. *Hyatt* v. *Pugsley*, 285

2. When an ambiguity, in a will, is apparent from the face of the instrument, the general rule is that it is not susceptible of explanation by extrinsic parol evidence. The will must, in such cases, be its own expounder. *ib*

4. An obscurity purely instrumental cannot be explained by parol evidence. If that is so great that it cannot be discerned with reasonable probability who, or what, is meant by the testator, the provision is deemed insensible, and the proposed gift must fail altogether. *ib*

5. External evidence is necessary, and always admissible, to identify the person or thing sufficiently described to make the devise or bequest effectual. If that points to but one object, or to but one individual, clearly designated in the will, that controls. No evidence can then be received that any other person or thing was intended. But if the extrinsic evidence for identification produces uncertainty as to either, that may be removed or explained by other testimony. *ib*

6 The difficulty may be removed by the same instrumentality by which it is produced. The admissible evidence, in such cases, is always explanatory of person or thing actually expressed in the will. No parol evidence can be received to prove an additional or different subject matter or some other donee. *ib*

WITNESS.

1. In an action upon a promissory note, against the maker and indorsers, an indorser is a competent witness for his co-defendants, to prove usury in the note. *Bank of Auburn* v. *Walter*, 441

2. Where a plaintiff is examined as a witness for the defendant, his testimony, given on the trial of a former action, between himself and another person, which is directly contrary to what he testifies to in the second suit, may be given in evidence, as an admission. *Pickard* v. *Collins*, 444

3. The defendant has a right to prove the former testimony, as an admission, by any competent witness, other than the plaintiff. He may also prove it by the plaintiff himself, unless the latter objects on the ground that he is privileged from answering. *ib*

4. A plaintiff is not bound to answer as to what he testified on a former trial; inasmuch as he might thus aid a prosecution against him for perjury. But the right to object is personal to him, as a witness. *ib*

5. A defendant is not precluded from examining the plaintiff, or any other person, on that point, because his testimony might impeach the plaintiff as a witness. He has no right to use it for the latter purpose. Having called the plaintiff to testify, he thereby represents him as deserving of credit, and is precluded from denying it by introducing evidence for the purpose of impeaching him, showing either that his general character for truth is bad, or that he has made previous contradictory statements. But he may, by any pertinent evidence, prove a fact to be otherwise than as testified to by the plaintiff. *ib*

6. A party is always at liberty to show what the material facts of a case are, although in so doing he may contradict the testimony of some of his own witnesses, and the evidence may thus tend, indirectly, to discredit them. And these facts may be shown by the admissions of the opposite party, as well as by other evidence. *ib*

END OF VOLUME TWENTY-THREE.


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